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2701
No. 13010

United States
Court of Appeals
for the Ninth Circuit.

POTLATCH OIL & REFINING COMPANY, a
Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN and ROY E.
LARSON, as Trustees of That Certain Trust
Known as Inland Empire Oil and Gas Syndi-
cate, a Common Law Trust,

Appellants,

vs.

THE OHIO OIL COMPANY, a Corporation,
Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 368)

Appeal from the United States District Court,
for the District of Montana.

FILED

No. 13010

United States
Court of Appeals
for the Ninth Circuit.

POTLATCH OIL & REFINING COMPANY, a
Corporation, and JEAN P. GERLOUGH,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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In the District Court of the United States in and
for the District of Montana, Great Falls
Division

Civil No. 956

POTLATCH OIL AND REFINING COMPANY,
a Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN and ROY E.
LARSON, as Trustees of That Certain Trust
Known as INLAND EMPIRE OIL AND
GAS SYNDICATE, a Common Law Trust,
Plaintiffs,

vs.

THE OHIO OIL COMPANY, a Corporation,
Defendant.

Be It Remembered, that on May 2, 1947, a Transcript of Removal consisting of a Complaint, Petition for Removal, Demurrer and Order Granting Removal, was duly filed herein, in the words and figures following, to wit: [2*]

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

In the District Court of the Ninth Judicial District
of the State of Montana, in and for the County
of Toole

Civil No. 956

POTLATCH OIL AND REFINING COMPANY,
a Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN, and ROY E.
LARSON, as Trustees of That Certain Trust
Known as INLAND EMPIRE OIL AND GAS
SYNDICATE, a Common Law Trust,

Plaintiffs,

vs.

THE OHIO OIL COMPANY, a Corporation,
Defendant.

COMPLAINT

The Plaintiffs complain of the Defendant and
for cause of action allege:

I.

That at all of the times hereinafter referred to,
the Plaintiff Potlatch Oil and Refining Company
was and now is a corporation duly created, organized
and existing under and by virtue of the laws
of the State of Montana.

II.

That at all of the times hereinafter referred to
the Defendant The Ohio Oil Company, was and
now is a corporation duly created, organized and
existing under and by virtue of the laws of the

State of Ohio and duly authorized and licensed to engage in business, as a corporation, within the State of Montana.

III.

That at all times on the 15th day of June, A.D. 1922, and thereafter, for approximately five years, the Troy-Sweetgrass Oil Syndicate was a business trust, commonly known as a common law trust, duly created and organized and existing under the laws of the State of Montana, and as such was engaged in business within the State of Montana, as a trust estate, under the name and style of Troy-Sweetgrass Oil Syndicate. [3]

IV.

That at all of the times hereinafter mentioned Inland Empire Oil and Gas Syndicate was and now is a business trust, commonly known as a common law trust, duly created, organized and existing under the laws of the State of Montana and as such was and is engaged in business within the State of Montana, as a trust estate, under the name and style of Inland Empire Oil and Gas Syndicate, and that Jean P. Gerlough, B. H. Hornby, and Stanley H. Hodgman are the duly appointed, qualified and acting managing trustees of said trust estate.

V.

That on or about the 15th day of June, A.D. 1922, pursuant to oral negotiations and agreements theretofore had, said Troy-Sweetgrass Oil Syndicate and the defendant, The Ohio Oil Company, made

and entered into a certain writing denominated "Operating Agreement" and a certain writing denominated "Assignment," a true and correct copy of which said "Operating Agreement" is hereto annexed marked "Exhibit A" and by this reference incorporated in and made a part hereof, and a true and correct copy of which aforesaid "Assignment" is hereto annexed marked "Exhibit B" and by this reference incorporated in and made a part hereof. That the making and entering into aforesaid "Operating Agreement" and aforesaid "Assignment" were done at the solicitation of Defendant and constituted substantially part and parcel of the one transaction. That said "Operating Agreement" and said "Assignment" were written and prepared by the Defendant, The Ohio Oil Company, and its officers and attorneys and the language thereof was and is the language of said Defendant corporation and its officers and attorneys and that before the said "Operating Agreement" and "Assignment" were reduced to writing it was, among other things, orally understood and expressly agreed between the parties thereto that the share of Troy Sweetgrass Oil Syndicate [4] of the costs and expenses incident to the drilling, development and operation of the lands described in said "Operating Agreement" for the production of oil and gas chargeable against the share of said syndicate of the oil and gas production from the described lands would be restricted and limited exclusively to the cost of the actual drilling itself of the wells at their locations on said lands except the expense of

the drilling of the first well which was to be borne solely and wholly by the Defendant, and the placing of said wells in condition to deliver the oil and gas production therefrom at their respective locations upon said land plus the actual cost of the equipment located wholly within and upon the said lands and the actual cost of the installation of said equipment and repairs and replacement of said equipment and that all other costs of operating said lands and producing and marketing the oil and gas therefrom would be the sole expense of and wholly chargeable to the Defendant alone. The Defendant, The Ohio Oil Company, thereupon promised to reduce the said terms of said oral agreements to writing in form of formal written agreement to be signed by the parties as evidence of said oral agreements, and thereafter Defendant prepared aforesaid written "Operating Agreement" and "Assignment" and prior to the signing thereof the Defendant directed the attention of the said Troy-Sweetgrass Oil Syndicate to the following express provisions of paragraph "III" of said "Operating Agreement," to wit, "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands," as expressing the aforesaid oral agreement of the said Troy-Sweetgrass Oil Syndicate and the Defendant limiting and restricting the said expenses chargeable against the said syndicate, as aforesaid, and, at the time, said Defendant stated and represented to the said Troy-Sweetgrass Oil Syndicate that the purpose of said

express provisions was to express the true intent to limit expenses chargeable against said syndicate to the cost of the actual drilling [5] itself of wells at their locations on said lands, except the expense of the drilling of the first well which was to be borne wholly and solely by the defendant, and the placing of said wells in condition to deliver the oil and gas production therefrom, at their respective locations upon said lands, plus the actual cost of the equipment located wholly within said lands and the actual cost of installation of said equipment and of repairs and replacement of said equipment and that defendant so interpreted and construed said express provisions in connection with all terms of said "Operating Agreement" and "Assignment" and upon such statement and representation by defendant, and it then knowing that Troy-Sweetgrass Oil Syndicate believed and relied upon same, and with such mutual understanding and construction of said agreement as to the limited and restricted expenses, as aforesaid, chargeable to said syndicate under said "Operating Agreement" and "Assignment" and "Operating Agreement" and "Assignment" were thereupon signed by the Troy-Sweetgrass Oil Syndicate and the Defendant, respectively.

VI.

That pursuant to the terms aforesaid "Operating Agreement" and "Assignment" the Defendant, The Ohio Oil Company, assumed and took possession and control of the lands and of the oil and gas leases described therein and assumed the control

and management of the said lands and leases for the purpose of the drilling, development, and operation thereof for oil and gas purposes and of the marketing of the oil and gas which thereafter might be produced in, upon and from said lands and at all times since on or about the said 15th day of June, A.D. 1922, to and including the 31st day of January, A.D. 1943, the said Defendant corporation had and maintained possession of said lands and had and maintained sole and exclusive control and management of the said lands and leases for the drilling, development and operation thereof for oil and gas purposes, including the marketing of the oil and gas produced in, upon and from said lands, and of all equipment in connection therewith.

VII.

That subsequent to the 15th day of June, A.D. 1922, the Defendant corporation commenced the drilling of an exploratory well for the discovery and production of oil and gas at a location upon [6] the lands described in aforesaid "Operating Agreement" and "Assignment" and thereafter discovered oil in commercial quantities in said well and thereafter continued the work of drilling, developing and operating said lands for oil and gas until on or about January 31, 1943, upon which latter date it sold, assigned and conveyed to the Texas Company all of the rights and interests of said Defendant in, to and under said "Operating Agreement" and "Assignment" and in and to the lands described therein.

VIII.

That on or about the 1st day of June, A.D. 1923, said Troy-Sweetgrass Oil Syndicate assigned, transferred and conveyed to The Inland Empire Oil and Gas Syndicate an undivided one-half of the then interest of said Troy-Sweetgrass Oil Syndicate in the said oil and gas leases and "Operating Agreement" insofar as same pertained to the Southwest Quarter (SW $\frac{1}{4}$) of Section Three (3) and Southeast Quarter (SE $\frac{1}{4}$) of Section four (4), Township 35 North, Range 2 West, Montana Principal Meridian, commonly known as the "Baker Lease." That notice of the acquisition by Inland Empire Oil and Gas Syndicate of aforesaid interest from Troy-Sweetgrass Oil Syndicate was given to the Defendant, The Ohio Oil Company on or about the 2nd day of June, 1923, and at all times since the said Defendant has recognized the ownership of said interest by Inland Empire Oil and Gas Syndicate.

IX.

That on or about the 18th day of August, A.D. 1923, the aforesaid Troy-Sweetgrass Oil Syndicate assigned and set over, transferred and conveyed unto Plaintiff Potlatch Oil and Refining Company all of the remaining undivided interest of the said Troy-Sweetgrass Oil Syndicate in aforesaid lands and in the oil and gas leases embracing said lands and in and to the aforesaid "Operating Agreement." That since the acquisition by Plaintiffs, respectively, of aforesaid interests the respective interests of the Defendant and of the Plaintiffs,

Potlatch Oil and Refining Company and Inland Empire Oil and Gas Syndicate therein and thereto were and are in undivided 55% interest in the Defendant, The Ohio Oil Company, and an undivided 22½% interest in the Inland Empire Oil and [7] Gas Syndicate and an undivided 22½% interest in the Potlatch Oil and Refining Company, insofar as same pertain to the aforesaid three hundred and twenty acres of land known as the "Baker Lease" and a 55% interest in the Defendant and a 45% interest in the Plaintiff Potlatch Oil and Refining Company therein and thereof insofar as same pertain to the remainder of said lands. That notice of the acquisition by Potlatch Oil and Refining Company of aforesaid interest from the Troy-Sweetgrass Oil Syndicate was given to the Defendant, The Ohio Oil Company, on or about the 20th day of August, A.D. 1923, and at all times since the said Defendant has recognized the ownership of said interest of said Potlatch Oil and Refining Company.

X.

That the aforesaid lands have been at all times since the drilling of the aforesaid first exploratory well drilled thereon producing and now are producing oil and gas in commercial quantities and that the exclusive possession of all of the oil and gas so produced was, during the time Defendant was possessed of said lands, marketed or otherwise disposed of exclusively under the sole management and control of the Defendant, The Ohio Oil Company.

XI.

That all proceeds from the sale and marketing and disposition of oil and gas produced from said lands during Defendant's possession of the lands were received in the first instance by the Defendant, The Ohio Oil Company, and that, contrary to the express agreement of the parties and of the provisions of aforesaid "Operating Agreement," the Defendant improperly held and improperly charged the Plaintiffs beyond their share and interest in the production and equipment from in or upon said lands in the Defendant, during the period of its time of possession, management and control of the drilling, development and operation of said lands for oil and gas, deducted from the Plaintiffs' shares of the [8] proceeds from oil and gas, marketed and appropriated by Defendant from said lands, monies representing items of expense that in no manner represented costs of actual drilling itself of the wells or actual cost of equipment in or upon said lands, or actual costs of installation of said equipment or repairs or replacements of said equipment and in addition thereto, Defendant improperly charged the shares of Plaintiffs in the proceeds of oil and gas with interest at the rate of eight (8%) per cent per annum on the amounts of said improper charges in an amount known to the Defendant and unknown to the Plaintiffs. That in addition to charges improperly made, as aforesaid, the Defendant corporation also made excessive and unreasonable charges for equipment and expenses of exploration, development and operation of said

lands, in an exact amount known to the Defendant corporation and unknown to Plaintiffs and improperly charged interest at the rate of eight (8%) per cent per annum on said excessive and unreasonable charges; and Defendant also improperly, erroneously and wrongfully charged Plaintiffs, as alleged, "overhead expenses" of Defendant, a sum of money equal to approximately $41\frac{1}{2}\%$ to the total amount of money which Defendant claimed it had expended in attempting to perform the terms of said "Operating Agreement."

XII.

That contrary to the express terms and provisions of said "Operating Agreement" and instead of selling the oil produced in and from the aforesaid lands or paying or accounting to Plaintiffs for their shares of said oil at the prevailing market price at the wells for said oil, the said Defendant purchased and appropriated the oil so produced to its own use and allowed the Plaintiffs credits for their shares of the oil so produced in amounts, respectively, varying from 10 cents a barrel to 20 cents a barrel below the prevailing market price for oil at the wells, thereby depriving the Plaintiffs of their just shares of the proceeds of said oil based upon the market price prevailing at the wells in an exact amount [9] known to the Defendant and unknown to Plaintiffs.

XIII.

That the attention of the Defendant was directed to said improper, illegal, inequitable and erroneous

charges and credits aforesaid and that said Defendant expressly promised that said erroneous, improper, illegal and inequitable charges and credits and any and all erroneous, improper, illegal and inequitable charges made at any time would be rectified and payment made to Plaintiffs therefor upon a correct, full and final accounting which said Defendant promised it would later make and render to the Plaintiffs.

XIV.

That no full, final and correct accounting promised as aforesaid has ever been made by the Defendant to the Plaintiffs pertaining to its operations under aforesaid "Operating Agreement" and "Assignment" nor has payment been made by Defendant, nor by any other person or persons on its behalf, to the Plaintiffs of the amounts of aforesaid erroneous, improper, inequitable and illegal charges and interest charges and credits with the result that the Plaintiffs have been deprived by the Defendant from receiving and realizing the benefits under aforesaid "Operating Agreement" and "Assignment" to which they were and are justly entitled.

XV.

That written notices of Plaintiffs' claims of aforesaid illegal and inequitable charges and credits have been heretofore given the Defendant and written demands have been heretofore made by the Plaintiffs, respectively, to and upon the said Defendant that said Defendant render a true and correct accounting in accordance with the terms and provisions of

aforesaid "Operating Agreement" and "Assignment" and make payment to Plaintiffs, respectively, of the amounts found due upon such accounting and that Defendant has failed and refused to render said true and correct accounting and has failed to make payment to said Plaintiffs of sums which will be [10] found due to Plaintiffs, from the Defendant, upon said accounting.

XVI.

That upon a true and correct accounting by Defendant to Plaintiffs there will be found to be due and payable to Plaintiffs, respectively, large sums of money the exact amounts of which are known to Defendant and unknown to Plaintiffs and which Plaintiffs allege will be in excess of the sum of One Hundred Seventy-five Thousand Dollars (\$175,000.00) due Plaintiff Inland Empire Oil and Gas Syndicate, and will exceed the sum of One Hundred Ninety-five Thousand Dollars (\$195,000.00) due to the Plaintiff Potlatch Oil and Refining Company.

XVII.

That said Troy-Sweetgrass Oil Syndicate and the Plaintiffs, respectively, have performed all of the terms, conditions and provisions of said "Operating Agreement" and "Assignment" upon their parts to be performed.

Wherefore, Plaintiffs pray judgment that the Defendant render a true and correct accounting to the Plaintiffs, respectively, of Defendant's operations

under aforesaid "Operating Agreement" and "Assignment" and that said Defendant be adjudged and ordered to pay to Plaintiffs, respectively, the sums found due and owing upon such accounting and for such other and further relief as may be equitable, just and proper.

E. J. McCABE,

Attorney for Plaintiffs.

State of Montana,
County of Cascade—ss.

E. J. McCabe, being first duly sworn, deposes and says:

That he is the attorney for the Plaintiffs named in the foregoing complaint, that he has read said complaint, knows the contents thereof, and that same is true to the best knowledge, [11] information and belief of affiant.

That affiant makes this verification for and on behalf of the Plaintiffs for the reason that no officer, agent or trustee of the said Plaintiffs, or of either of the said Plaintiffs, is within the County of Cascade wherein affiant resides and maintains his office and where this verification if made.

E. J. McCABE.

Subscribed and sworn to before me this 17th day of March, 1947.

[Seal]: FLOYD E. SMITH,
Notary Public for the State of Montana Residing at
Great Falls, Montana.

My commission expires 6-14-48. [12]

EXHIBIT A

Operating Agreement

This Agreement, made and entered into this fifteenth day of June, A.D. 1922, by and between the Troy-Sweetgrass Oil Syndicate, a common law trust, of Shelby, Montana, County of Toole, State of Montana, hereinafter called the party of the first part, and the Ohio Oil Company, an Ohio corporation, of Findlay, Ohio, hereinafter called the party of the second part, Witnesseth:

That, Whereas, the said party of the first part in pursuance of a prior verbal agreement did on this date sell, assign, transfer and convey unto the said party of the second part, its successors or assigns, an undivided Fifty-five (55%) per centum interest in and to the oil and gas leases covering the following described lands, to wit:

West half ($W\frac{1}{2}$) of Section thirty-three (33), and East half of East half ($E\frac{1}{2}E\frac{1}{2}$) of Section twenty-eight (28), West half of West half ($W\frac{1}{2}W\frac{1}{2}$), northeast quarter of southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$), North half of Southeast quarter ($N\frac{1}{2}SE\frac{1}{4}$), and southeast quarter of southeast quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section twenty-seven (27), and west half of southwest quarter ($W\frac{1}{2}SW\frac{1}{4}$) of Section twenty-six (26), all in Township thirty-six (36) north, Range two (2) west, M. M., and North half ($N\frac{1}{2}$) of Section one (1), and Southwest quarter ($SW\frac{1}{4}$) of Section three (3), and Southeast quarter ($SE\frac{1}{4}$) of Section four (4),

being situate in Township thirty-five (35) North, Range Two (2) west, of M. M., and all above described lands situate in Toole County, State of Montana, and containing fifteen hundred and twenty (1520) acres, more or less, and,

Whereas, the party of the first part is desirous of having the party of the second part develop and operate said premises for oil and gas purposes, and,

Whereas, the parties hereto desire to reduce to writing the terms and conditions of their understanding or agreement,

Now, Therefore, in consideration of the premises and one dollar by each of the parties hereto to the other in hand paid, the receipt of which is hereby acknowledged, and of the covenants and stipulations hereinafter contained, to be duly kept, paid and performed by the parties hereto, it is hereby mutually agreed:

I. The party of the second part shall have the control and management of the said lands and leases and of the development and operation thereof for oil and gas purposes, including the marketing of the oil and gas produced.

II. As a consideration for the assignment hereinabove mentioned, the party of the second part agrees that it will commence the drilling of a well within thirty days from the date hereof upon the above described lands and at such location as shall be selected by the party of the second part and will continue said work in a diligent and work-

manlike manner to such a depth as shall be deemed an adequate test of the oil and gas content of the first commercial oil sand, in compliance with the terms and conditions of the leases of the party of the first part. It is further agreed that said well shall be drilled free of all cost and expense to the party of the first part, and in the event the said first well shall be termed a failure and of no commercial value and the second party desires to surrender the lease or leases it is understood and agreed that the party of the first part shall have no right or title whatsoever in or to any material, tools or equipment of any kind that has or have been furnished by the second party for the drilling of such well.

III. In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and as is consistent with good business management. It will pay all costs and expenses of developing and [13] operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part Forty-five (45%) per cent thereof. Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) per centum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof. The

said party of the second part shall be reimbursed by the said party of the first part solely from the first party's proportion of the oil and gas produced and sold from said land. Application from proceeds from sale of said oil and gas will be made to the credit of the first party's account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The party of the second part shall be entitled to and shall charge the party of the first part eight (8) per centum interest upon all moneys so advanced for the development and operations upon said lands for the account of the interest of the first party's until the same shall have been paid out of the proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production.

IV. The party of the second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expenses of developing and operating said lands and leases and will remit monthly to the party of the first part all proceeds of the oil and gas sold from the interest of the first party over and above the amount necessary to reimburse the party of the second part for expenditures made by it for the account and interest of the party of the first part.

V. The party of the first part through its duly

authorized agents or representatives shall at all reasonable times have access to the buildings, lands and property hereinabove for the purpose of examining the operations thereon and the production therefrom, and at all reasonable times during business hours shall have the right to examine the books and records of the party of the second part insofar as they pertain to the operations conducted under this agreement.

VI. The party of the first part hereby gives and grants unto the party of the second part upon the considerations aforesaid the first right and option to purchase the interest of the first party in the lands and lease above described under and by virtue of the terms of this agreement should the first party at any time desire to dispose of its said interest.

VII. The party of the second part shall fully comply with all the terms and provisions contained in the leases hereinabove described unless and until surrendered unto the party of the first part, but shall have the right, however, upon the payment of One Dollar to the party of the first part, to surrender the whole or any part of the above described leases and lands embraced and included therein, and shall thereafter be relieved by said party of the first part from any further liabilities as to any such lands surrendered.

The terms and conditions of this agreement shall extend to and be binding upon the heirs, administrators, successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have caused this instrument to be executed the day and year first above written.

Witness:

A. M. SELLERY.

Witness:

A. M. SELLERY.

[Seal] TROY-SWEETGRASS OIL
SYNDICATE,

By T. P. JONES,
President,

Attest:

KENNETH G. LUKE,
Secretary,
Party of the first part.

[Seal] THE OHIO OIL COMPANY,

By F. E. HURLEY,
Vice President,

Attest:

.....,

Secretary,
Party of second part. [14]

EXHIBIT B

Assignment

Know All Men by These Presents, That the Troy-Sweetgrass Oil Syndicate, a common law trust, of Shelby, Montana, for and in consideration of the sum of One Dollar to it in hand paid, receipt of which is hereby acknowledged, does hereby sell, assign, transfer, quitclaim, convey and confirm unto The Ohio Oil Company, a corporation, of Findlay, Ohio, its successors and assigns, an undivided fifty-five (55%) per centum interest in and to the following described oil and gas leases and lands, to wit:

1. A certain oil and gas lease made and entered into on June 16, A.D. 1920, by and between Frank McMahan, party of the first part, and Thomas D. Brown, party of the second part, covering the West half of the Southwest Quarter ($W\frac{1}{2}SW\frac{1}{4}$) of Section Twenty-six (26), Township Thirty-six (36) north, Range Two (2) west, M.M., the East half of Southeast quarter ($E\frac{1}{2}SE\frac{1}{4}$), the Northwest quarter of the Southeast quarter ($NW\frac{1}{4}SE\frac{1}{4}$), and the Northeast quarter of the Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$) of Section Twenty-seven (27), Township Thirty-six (36) North, Range Two (2) West, M.M., Toole County, Montana, containing two hundred and forty (240) acres, more or less.

2. A certain oil and gas lease made and entered into on June 7, A.D. 1920, by and between Mrs. Cora Phillips, party of the first

part, and Thomas D. Brown, party of the second part, covering the West half of West half ($W\frac{1}{2}W\frac{1}{4}$) of Section Twenty-seven (27), and the East half of the East half ($E\frac{1}{2}E\frac{1}{2}$) of Section Twenty-eight (28), all in Township Thirty-six (36) north, Range Two (2) west, Toole County, Montana, containing three hundred and twenty (320) acres, more or less;

3. A certain oil and gas lease made and entered into April 29, A.D. 1922, by and between Israel Sindon and Sophia Sindon (his wife), parties of the first part, and the Potlatch Oil and Refining Company, party of the second part, covering the North half ($N\frac{1}{2}$) of Section One (1), Township Thirty-five (35) north, Range Two (2) west, M.M., Toole County, Montana, covering three hundred and twenty (320) acres, more or less;

4. A certain oil and gas lease made and entered into April 27, 1921, by and between Irving H. Baker, a single man, party of the first part, and the Troy-Sweetgrass Oil Syndicate, party of the second part, covering the Southwest quarter ($SW\frac{1}{4}$) of Section Three (3) and the Southeast quarter of Section Four (4), all in Township Thirty-five (35) north, Range Two (2) west, M.M., Toole County, Montana, containing three hundred and twenty (320) acres, more or less;

5. A certain Warranty Deed made and entered into on April 17, 1922, by and between

Thomas Hamsen Anderson, a single man, party of the first part, and The Troy-Sweetgrass Oil Syndicate, a common law trust, party of the second part, covering the West half (W $\frac{1}{2}$) of Section Thirty-three (33), situate in Township Thirty-six (36) north, Range Two (2) west, of the M.M., Toole County, Montana, containing three hundred and twenty (320) acres, more or less.

To Have and to Hold, the said undivided fifty-five (55%) per centum interest in and to the foregoing oil and gas leases and lands unto said The Ohio Oil Company, its successors and assigns forever, for the purpose of developing and operating said lands for oil and gas purposes, but subject nevertheless to all the terms and conditions as set forth therein.

TROY-SWEETGRASS OIL
SYNDICATE,

By T. P. JONES,
President.

Attest:

[Seal] KENNETH G. LUKE,
Secretary.

Witness:

A. M. SELLERY.

[Endorsed]: Filed Mar. 18, 1947, Ninth Judicial District Court, Montana. [15]

In the District Court of the Ninth Judicial District
of the State of Montana, in and for the County
of Toole

[Title of Cause.]

PETITION FOR REMOVAL TO THE DIS-
TRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA

Comes Now the Ohio Oil Company, a corporation,
named as the sole defendant in the above-entitled
cause, and files this its petition for removal of this
case from the aforesaid District Court in which it
is now pending, to the District Court of the United
States, in and for the District of Montana, and as
grounds for said petition, this defendant says as
follows:

1. This cause was filed in this Court on March
18, 1947, and is now pending therein.

2. Said cause is one of a civil nature, of which
the District Courts of the United States have orig-
inal jurisdiction, being a suit in equity for an
accounting.

3. The matter in controversy in the above-
entitled cause exceeds the sum of Three Thousand
(\$3,000.00) Dollars, exclusive of interest and costs.

4. The above-entitled action involves a contro-
versy which is wholly between citizens of different
States in that plaintiff Potlatch Oil and Refining
Company is a corporation organized and existing
under and by virtue of the laws of the State of

Montana, and was, at the time of commencement of said suit, and ever since has been and still is a citizen of the State of Montana; and plaintiff Inland Empire Oil and Gas Syndicate, a business trust, has no legal capacity to bring suit in this Court and should therefore be disregarded for removal purposes, or in the alternative, the trustees of said alleged [16] business trust as named in plaintiffs' complaint, namely, Jean P. Gerlough, B. H. Hornby and Stanley H. Hodgman, are the only persons legally capable of bringing suit on behalf of said business trust, and said Jean P. Gerlough and Stanley H. Hodgman were, at the time of the commencement of this cause, and ever since have been and still are residents and citizens of the State of Montana, and said B. H. Hornby was, at the time of the commencement of this cause, and ever since has been and still is a resident and citizen of the State of Idaho; and your petitioner, The Ohio Oil Company, sole defendant in said suit, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was, at the time of commencement of said suit, and ever since has been and still is a citizen of the State of Ohio, and a non-resident of the State of Montana.

5. This petition for removal is filed prior to the time your petitioner is required by the laws of the State of Montana or the rules of this Honorable Court to answer or plead to said complaint of plaintiffs in this cause.

6. Your petitioner files herewith a bond with

good land sufficient surety, conditioned as required by law that it will enter into the District Court of the United States for the District of Montana within thirty (30) days from the filing of this petition, a certified copy of the record in this suit, and that it will pay all costs which may be awarded by said District Court of the United States if said Court shall hold this cause was wrongfully or improperly removed thereto.

7. Prior to the filing of this petition and said bond, written notice thereof and of your petitioner's intention to file the same was duly given by your petitioner to plaintiffs in this cause as required by law, a true copy of said notice with proof of service being hereto attached.

Wherefore your petitioner prays that this Honorable Court proceed no further herein except to approve said bond herein filed and make an order of removal to the District Court of the United States for the District of Montana as required by law, and [17] to cause a transcript of the record herein to be prepared and filed in said District Court of the United States, according to the statutes of the United States in such case made and provided.

Dated this 1st day of April, 1947.

/s/ W. H. EVERETT,

/s/ LOUIS P. DONOVAN,

Attorneys for Petitioner, The Ohio Oil Company, an
Ohio Corporation.

State of Ohio,
County of Hancock—ss.

G. E. McCullough, being first duly sworn on oath, deposes and says that he is Vice President of The Ohio Oil Company, an Ohio corporation, petitioner in the above-entitled cause, and as such is duly authorized to make this affidavit; that he has read the above and foregoing petition and is familiar with the matters and facts therein set forth, and that said matters and facts therein set forth are true and correct.

/s/ G. E. McCULLOUGH.

Subscribed and sworn to before me, a Notary Public, in and for said County and State aforesaid, this 1st day of April, 1947.

[Seal] /s/ LONNIE E. DAVIS,
Notary Public, Hancock
County, Ohio.

My Commission Expires Jan. 11, 1949. [18]

The State of Ohio,
Hancock County—ss.

I, Walter D. Feller, Clerk of said County and of the Courts thereof, the same being Courts of record, do hereby certify that Lonnie E. Davis, whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing, was at the time of taking such proof or acknowledgment, a Notary Public in and for the said county, duly commissioned, sworn and authorized to take the same and

to take the proof or acknowledgment of deeds and other instruments in writing, and to administer oaths or affirmations in said county; and further, that I am well acquainted with his handwriting, and verily believe that the signature to the said proof or acknowledgment is genuine; and further, that the annexed instrument is executed according to the laws of the State of Ohio.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County, at Findlay, O., this 1st day of April, 1947.

[Seal] WALTER D. FELLER,
Clerk.

E. T.

[Endorsed]: Filed April 5, 1947, Ninth Judicial District Court, Montana. [19]

In the District Court of the Ninth Judicial District
of the State of Montana, in and for the County
of Toole

[Title of Cause.]

DEMURRER

Comes Now The Ohio Oil Company, a corporation, named as defendant in the above-entitled and numbered action, and demurs to Plaintiffs' Complaint upon the following grounds and for the following reasons:

1. That the co-plaintiff, Inland Empire Oil and Gas Syndicate, a business trust, has not the legal

capacity to sue, in that said Inland Empire Oil and Gas Syndicate is an unincorporated association commonly designated a business trust;

2. That there is a misjoinder of parties plaintiff in that said unincorporated association designated Inland Empire Oil and Gas Syndicate is joined as co-plaintiff with Potlatch Oil and Refining Company, a corporation.

3. That causes of action have been improperly united, in that the Complaint contains an alleged cause of action in favor of Potlatch Oil and Refining Company, a corporation, together with a separate and distinct cause of action in favor of the alleged co-plaintiff, Inland Empire Oil and Gas Syndicate.

4. That the Complaint does not state facts sufficient to constitute a cause of action in favor of Potlatch Oil and Refining Company.

5. That the Complaint does not state facts sufficient to constitute a cause of action in favor of the co-plaintiff, Potlatch Oil [20] and Refining Company, a corporation.

6. That the Complaint does not state facts sufficient to constitute a cause of action in favor of the co-plaintiff, Inland Empire Oil and Gas Syndicate, a business trust.

7. That the Complaint does not state facts sufficient to constitute a cause of action in favor of Potlatch Oil and Refining Company, a corporation,

and Inland Empire Oil and Gas Syndicate, a business trust, or either of them.

/s/ W. H. EVERETT,

/s/ LOUIS P. DONOVAN,

Attorneys for Petitioners,
Ohio Oil Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 7, 1947, Ninth Judicial District Court, Montana. [21]

In the District Court of the Ninth Judicial District
of the State of Montana, in and for the County
of Toole

[Title of Cause.]

ORDER GRANTING REMOVAL

This cause, coming on to be heard upon the petition of defendant The Ohio Oil Company, an Ohio Corporation, for an order removing this cause to the District Court of the United States for the District of Montana, and it appearing to this Court that said defendant has filed its petition for such removal in due form and within the required time to be filed and the bond duly conditioned as provided by law, and it being shown to the Court that the notice required by law of the filing of said bond and petition, had, prior to the filing thereof, been served upon the attorney for plaintiffs herein, which notice the Court finds sufficient.

And it appearing to the Court that this is a proper cause for removal to said District Court of the United States, this Court doth now hereby accept and approve said bond and said petition and doth order this cause to be removed to the District Court of the United States for the District of Montana, pursuant to the statute of the United States in such case made and provided, and doth further order that all other proceedings in said cause in this Court be stayed and that the Clerk of this Court prepare a transcript of the record in this cause [23] for transmission to said District Court of the United States in and for the District of Montana.

Dated this 19th day of April, 1947.

R. M. HATTERSLEY,

Judge of the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Toole.

[Endorsed]: Filed April 19, 1947; Ninth Judicial District Court, Montana.

[Transcript of Removal]: Filed May 2, 1947; District Court of the United States, District of Montana. [24]

[Title of District Court and Cause.]

CONSOLIDATED MOTION FOR SEVERANCE
OF CLAIMS, TO DISMISS FOR LACK OF
CAPACITY TO SUE, TO DISMISS ON
GROUND OF STATUTE OF LIMITA-
TIONS, FOR MORE DEFINITE STATE-
MENT, AND TO STRIKE CERTAIN
PORTIONS OF PLAINTIFFS' COM-
PLAINT

Comes Now the above-named defendant and by this consolidated motion moves the court—(1) for an order severing the claims asserted against it herein by plaintiffs; (2) for an order dismissing said action as to Plaintiff, Inland Empire Oil and Gas Syndicate, for lack of capacity to sue; (3) for an order dismissing said action on the ground of statutes of limitations; (4) for an order requiring plaintiffs to make their complaint more definite in various particulars; and (5) for an order striking from plaintiffs' complaint various portions thereof.

First

Motion for Severance of Claims

Defendant moves the court for an order severing the claim asserted against it herein by Plaintiff, Inland Empire Oil and Gas Syndicate, from the claim asserted herein against defendant by Plaintiff, Potlatch Oil and Gas Company, on the [26] grounds that:

- (1) Defendant was not a party to the contracts

under which either plaintiff may have acquired its respective interest from their common predecessor in interest and the issues as between defendant and one plaintiff may be entirely different than those between defendant and the other plaintiff;

(2) Defendant may be put to undue expense and embarrassment if it is required to proceed with its defense as to both plaintiffs at once without a severance of the cases and issues;

(3) The trial of the action will be embarrassed and confused by a joint trial of the claims asserted against this defendant by both plaintiffs, in that defendant may have independent defenses as to many of the claims of one plaintiff, which said defenses may be the same or may be entirely different from those against the other plaintiff, and to permit plaintiffs to proceed in this suit without separately stating their alleged claims would be in violation of Rule 10 (b) of the Federal Rules of Civil Procedure, in that a separate statement of the claim of each plaintiff is necessary to facilitate the clear presentation of their respective claims.

Second

Motion to Dismiss for Lack of Capacity to Sue

Defendant moves the court for an order dismissing the action insofar as plaintiff Inland Empire Oil and Gas Syndicate is concerned on the following grounds:

1. Plaintiff Inland Empire Oil and Gas Syndi-

cate alleges itself to be a business trust. The complaint [27] fails to state a claim against the defendant upon which relief can be granted, in that a business trust has no capacity to sue as such under the laws of the State of Montana.

Third

Motion to Dismiss on Ground of Statutes of Limitations

Defendant moves the court to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted in that it appears on the face of the complaint:

1. That the claim arose more than ten years prior to the filing of the complaint herein and that the action is therefore barred by the applicable provisions of Subdivision 2 of Section 9028 of the Revised Codes of Montana of 1935;

2. That the claim arose more than eight years prior to the filing of the complaint herein and that the action is therefore barred by the applicable provisions of Section 9029 of the Revised Codes of Montana of 1935;

3. That the claim arose more than five years prior to the filing of the complaint herein and that the action is therefore barred by the applicable provisions of Subdivision 1 of Section 9030 of the Revised Codes of Montana of 1935;

4. That the claim arose more than three years prior to the filing of the complaint herein and that

the action is therefore barred by the applicable provisions of Subdivision 3 of Section 9031 of the Revised Codes of Montana of 1935; [28]

Fourth

Motion for More Definite Statement

Defendant moves the court for an order requiring plaintiffs to make a more definite statement of the following matters which are averred by plaintiffs in their complaint, but which are not averred with sufficient definiteness or particularity to enable defendant properly to prepare its responsive pleading or to prepare for trial. The defects complained of and the details desired are as follows:

1. In connection with the entire complaint, each plaintiff should be required to separately state its alleged claim against defendant so as to comply with the provisions of Rule 10 (b) of the Federal Rules of Civil Procedure in that a separation would facilitate the clear presentation of the matters set forth;

2. In connection with Paragraph IV of the complaint, that plaintiffs be required to show the extent and nature of the trust, together with the names and addresses of the real parties in interest;

3. In connection with Paragraph VII of the complaint, that plaintiffs be required to show the date of commencement and completion of the exploratory well therein referred to, together with the location by lease and legal description, and that plaintiffs be required to attach to the complaint a

copy of the lease under which the well was drilled, and that plaintiffs be required to state in barrels the amount of oil discovered and to set forth, by bill of particulars or otherwise, the wells drilled, giving dates, depths, amounts of production in barrels, and giving the detail in connection with [29] the development and operation of lands, separating such detail as to leases;

4. In connection with Paragraph VIII of the complaint, that plaintiffs be required to show the manner in which the alleged notice was given, whether verbal or written, the date of such notice and to whom same was given, and that plaintiffs also be required to allege at what times and in what manner Plaintiff Inland Empire Oil and Gas Syndicate's alleged ownership has been recognized by defendant;

5. In connection with Paragraph IX of the complaint, that plaintiffs be required to show the manner in which the alleged notice was given, whether verbal or written, the date of such notice, and to whom same was given, and that plaintiffs also be required to allege at what times and in what manner Plaintiff Potlatch Oil and Refining Company's alleged ownership has been recognized by defendant, and that plaintiffs be required to show by legal description what lands and leases are referred to in said paragraph, showing further the alleged interests therein of plaintiffs and defendant as to each such lease;

6. In connection with Paragraph X of the complaint, that plaintiffs be required to set forth the dates of drilling of the alleged exploratory well and, by bill of particulars or otherwise, to set forth the dates of completion together with location of wells by legal description and under what leases same were drilled, and further show the amount or amounts of production in barrels, price received and the detail on other disposition referred to in said paragraph, by barrels, wells and leases; [30]

7. In connection with Paragraph XI of the complaint, that plaintiffs be required to set up, by bill of particulars or otherwise, the particular items charged to plaintiffs pursuant to said Operating Agreement to which plaintiffs object, together with dates of said items and the alleged grounds of such objections, so that defendant may be informed of the exact amount of plaintiffs' claim and why it is alleged that said claim exists, giving also the dates of prior objections made to defendant by plaintiffs, or either of them, with reference to any of said items, and to set forth with particularity the manner and dates and to whom the claim was made which plaintiffs allege: "Defendant claimed it had expended in attempting to perform the terms of said 'Operating Agreement' ";

8. In connection with Paragraph XII of the complaint, that plaintiffs be required to set up, by bill of particulars or otherwise, the amounts credited to plaintiffs for their shares of the oil and the basis

of such amounts, including prices, amount of oil and dates, also the prevailing market price or prices for the oil at the wells and the dates of such prices, and the amount or amounts in barrels of oil which it is alleged defendant purchased and appropriated and the dates applicable thereto;

9. In connection with Paragraph XIII of the complaint, that plaintiffs be required to set up, by bill of particulars or otherwise, the charges and credits to which they object, giving the dates and amounts thereof as well as the dates which they [31] claim that the attention of the defendant was directed to such items, and to state with particularity when, where and in what manner the defendant expressly promised to rectify any such claimed erroneous charges, whether written or verbal, and to and by whom made and upon what authority;

10. In connection with Paragraph XV of the complaint, that plaintiffs be required to attach copies of the written notices which they allege were given to defendant by plaintiffs and to set up the charges and credits which plaintiffs claim were inequitable, giving also the dates of said items and the alleged grounds of such objections so that defendant may be informed of the exact amount of plaintiffs' claim and why it is alleged that said claim exists, also setting forth with particularity all accounts which have been furnished to plaintiffs by defendant and accepted by plaintiffs without exception;

11. In connection with Paragraph XVI of the complaint, that plaintiffs be required to set up, by bill of particulars or otherwise, the sums of money which they allege to be due, showing the amounts thereof by years.

Fifth

Motion to Strike

Defendant moves the court to strike from the plaintiffs' complaint the following allegations for the reasons hereinafter set forth:

1. All of Paragraph III for the reason that the matters stated therein are redundant, immaterial and impertinent.

2. That portion of Paragraph V commencing with the [32] words "That the making" in the 21st line on page 2 of said complaint and continuing to the end of said paragraph, for the reason that said matter is redundant, immaterial and impertinent.

3. All of Paragraph XI on pages 6 and 7 for the reason that the statements therein contained are redundant, immaterial, impertinent or scandalous matter, the same constitute a conclusion of the pleader and do not constitute any pretended statement of fact or facts which is a part of any pretended cause of action in favor of plaintiffs and against defendant, said allegations are in conflict with the specific terms and provisions of the operating agreement attached to and made a part of plaintiffs' complaint, and constitute sham pleading.

4. The words “improper, illegal, inequitable and erroneous” in the second line of Paragraph XIII (4th line on page 8), and the words “erroneous, improper, illegal and inequitable” in the 4th and 5th lines of Paragraph XIII (6th and 7th lines on page 8), for the reason that said statements are redundant, immaterial, impertinent or scandalous matter, and constitute mere conclusions of the pleader.

5. The words “aforesaid erroneous, improper, inequitable and illegal” in the 6th line of Paragraph XIV (17th line on page 8), and that portion of said paragraph beginning with the words “with the result that the” in the 18th line on page 8 and continuing to the end of said paragraph, for the reason that said matters are redundant, immaterial, impertinent or scandalous matter, and constitute mere conclusions of the pleader.

6. The words “illegal, and inequitable” in the 1st and 2nd lines of Paragraph XV (23rd and 24th lines on page 8), and that portion of said paragraph beginning with the words [33] “and has” in the 31st line on page 8 and continuing to the end of said paragraph, for the reason that said statements are a mere conclusion of the pleader, and are redundant, immaterial and impertinent.

7. All of Paragraph XVI on page 9 for the reason that said statements are mere conclusions of the pleader, and are redundant, immaterial and impertinent.

Dated this 2nd day of May, 1947.

/s/ LOUIS P. DONOVAN,
Attorney for The Ohio Oil
Company, Shelby, Montana.

/s/ W. H. EVERETT,
Attorney for The Ohio Oil
Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1947. [34]

[Title of District Court and Cause.]

MOTION FOR ORDER OF
SUBSTITUTION OF PARTY

Come Now Jean P. Gerlough and Stanley Hodgman, as trustees of that certain trust estate known and identified as Inland Empire Oil and Gas Syndicate, and Inland Empire Oil & Gas Syndicate, interchangeably, and as such trustees, two of the parties plaintiffs in the above-entitled action, by and through the undersigned, the attorney of record for said parties, and respectfully move the court for an order substituting Roy E. Larson of Shelby, Montana, as one of the present trustees of the aforesaid trust estate, as a party plaintiff in the above-entitled action in the place and stead of B. H. Hornby, who is named in the complaint filed in said action as one of the trustees of aforesaid trust estate for the reason that subsequent to the commencement of the

above-entitled action the said B. H. Hornby, named as a trustee of aforesaid trust estate in the complaint filed in said action, died, and the above-named Roy E. Larson of Shelby, Montana, was duly appointed as a trustee of aforesaid trust estate in the place and stead of said B. H. Hornby, deceased.

The within motion is based upon all the files, records and proceedings in the above-entitled action and upon the annexed affidavit of Jean P. Gerlough and the annexed written consent of aforesaid Roy E. Larson, trustee, to his substitution as a party plaintiff in said action in the place and stead of B. H. Hornby, deceased.

Dated this 8th day of August, 1947.

E. J. McCABE,

Attorney for Jean P. Gerlough and Stanley Hodgman, as Trustees of Inland Empire Oil and Gas Syndicate, a Business Trust.

[Endorsed]: Filed August 8, 1947. [37]

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Toole—ss.

Jean P. Gerlough being first duly sworn upon oath deposes and says:

That he is a resident of the city of Shelby, Toole County, Montana;

That at the time of the commencement of the above-entitled action in the district court of the ninth judicial district of the State of Montana, in and for the County of Toole, affiant and Stanley H. Hodgman, a resident of Missoula, Missoula County, Montana, and B. H. Hornby, a resident of the State of Idaho, were the duly appointed, qualified, and acting trustees of a certain trust estate, commonly known as a business trust, and which trust embraced undivided mineral interests in land situate in Toole County, Montana, and in a written agreement pertaining to said mineral interests in said lands as set forth and described in the complaint of the Plaintiffs filed in the above-entitled action, reference to which complaint is hereby made for full particulars thereof;

That affiant and said Stanley H. Hodgman and B. H. Hornby, as trustees of aforesaid trust estate conducted the business and affairs thereof in their collective capacities as such trustees under the [38] names Inland Empire Oil & Gas Syndicate and Inland Empire Oil and Gas Syndicate, interchangeably, and that said names Inland Empire Oil & Gas Syndicate and Inland Empire Oil and Gas Syndicate refer and pertain to the one and same aforesaid trust estate.

That in their capacities as said trustees they joined with the Potlatch Oil and Refining Company, a corporation, as parties Plaintiffs in commencing the above action and in the caption of the complaint filed in said action they used the name Inland Empire Oil and Gas Syndicate as represent-

ing and designating their collective capacities as trustees of aforesaid trust estate as Plaintiffs with said Potlatch Oil and Refining Company.

That subsequent to the commencement of the above-entitled action and its removal upon petition of the above-named defendant to the District Court of the United States in and for the District of Montana, to wit, on the 9th day of April, 1947, the aforesaid B. H. Hornby died and that thereafter, on the 15th day of May, 1947, Roy E. Larson of Shelby, Montana, was appointed trustee of aforesaid trust estate to fill the vacancy in the office of trustee resulting by reason of the death of the aforesaid B. H. Hornby and that thereafter on the 31st day of May, 1947, Roy E. Larson accepted appointment as a trustee of aforesaid trust estate and that at all times since said 31st day of May, 1947, affiant and said Stanley H. Hodgman and said Roy E. Larson have been and now are the duly appointed, qualified and acting trustees of aforesaid trust estate;

That the said Roy E. Larson has not been heretofore substituted as a party Plaintiff in said action;

That affiant makes this affidavit for and on behalf of the motion of affiant and said Stanley H. Hodgman, as parties in the above-entitled action, for the substitution of said Roy E. Larson as a party plaintiff in the above-entitled action in the place and stead of aforesaid B. H. Hornby, Deceased, and in support of the [39] motion of said affiant and Stanley H. Hodgman, for an order of the above-entitled court substituting the said Roy E. Larson as a party

Plaintiff in the above action in the place and stead of B. H. Hornby, deceased.

JEAN P. GERLOUGH.

Subscribed and sworn to before me this 10th day of July, 1947.

[Seal] DAVID C. THOMPSON,
Notary Public for the State of Montana, Residing
at Belton, Montana.

My Commission Expires April 30, 1949.

[Endorsed]: Filed August 8, 1947. [40]

[Title of District Court and Cause.]

NOTICE OF MOTION AND SUBMISSION
THEREOF ON BRIEF

To the Defendant above named and to Messrs. Louis
P. Donovan and W. H. Everett, its attorneys:

Please take notice that Jean P. Gerlough and Stanley Hodgman as trustees of Inland Empire Oil and Gas Syndicate, a business trust, and named as such in the complaint filed in the above-entitled action will, by written motion to be filed in the above-entitled court and cause on the 8th day of August, 1947, move the above-entitled court for an order substituting as a party plaintiff in said action, Roy E. Larson, as a trustee of said business trust, in the place and stead of B. H. Hornby as a trustee of said business trust, because of the death

of said B. H. Hornby, and will submit said motion to the court upon written briefs pursuant to rule 40 (2) of the special rules of the above-entitled court.

True and correct copies of aforesaid motion and brief are herewith delivered to and served upon you.

Dated August 8, 1947.

E. J. McCABE,
Attorney for Plaintiffs.

[Endorsed]: Filed August 8, 1947. [41]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of Montana,
County of Cascade—ss.

E. J. McCabe, being first duly sworn, deposes and says:

That he resides and maintains his office at Great Falls, Montana, and is the attorney of record for Jean P. Gerlough and Stanley Hodgman, two of the trustees of that certain trust estate, known and identified under the name of Inland Empire Oil and Gas Syndicate, and two of the parties plaintiffs in the above-entitled action;

That Louis P. Donovan is one of the attorneys of record for The Ohio Oil Company, defendant in aforesaid action, and resides and maintains his office at Shelby, Montana;

That on the 8th day of August, 1947, affiant enclosed true and correct copies of the annexed motion, notice of motion, affidavit of Jean P. Gerlough, and written consent of Roy E. Larson, and copy of the brief mentioned in aforesaid notice of motion, in a securely sealed envelope addressed to aforesaid Louis P. Donovan at Shelby, Montana, and deposited same in the United States Post Office at Great Falls, Montana, with postage thereon fully prepaid for transmission and delivery to the said Louis P. Donovan in regular course of United States Mail.

E. J. McCABE.

Subscribed and sworn to before me this 8th day of August, 1947.

[Seal] FLOYD E. SMITH,
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My Commission Expires 6-14-48.

[Endorsed]: Filed August 8, 1947. [42]

[Title of District Court and Cause.]

CONSENT TO SUBSTITUTION OF PARTY

I, the undersigned, Roy E. Larson, of Shelby, Montana, and one of the trustees of Inland Empire Oil and Gas Syndicate, a trust estate, hereby expressly consent to my appointment as a party plaintiff in the above-entitled action in the place and

stead of B. H. Hornby, trustee, deceased, and upon such substitution, I hereby promise and represent that I will act in the capacity as one of the plaintiffs in said action.

Dated this 9th day of July, 1947.

ROY E. LARSON.

State of Montana,
County of Toole—ss.

On this 9th day of July, 1947, before me, the undersigned, a Notary Public for the State of Montana, personally appeared Roy E. Larson, known to me to be the person whose name is subscribed to the foregoing written instrument and acknowledged to me that he personally executed the same.

In Witness Whereof, I hereunto set my hand and affix my official seal on the day and year in this certificate first above written.

[Seal] P. R. MacHALE,
Notary Public for the State of Montana, Residing
at Shelby, Montana.

My Commission Expires June 24th, 1948.

[Endorsed]: Filed August 8, 1947. [44]

[Title of District Court and Cause.]

ORDER

The court has considered the motion of plaintiffs for substitution of Roy E. Larson, the newly appointed trustee of the Inland Oil and Gas Syndicate, as a party plaintiff herein, and the later motion that the caption of the complaint be amended by naming the three trustees of said syndicate as party plaintiffs herein under Rules 6 and 15 of the Federal Rules of Civil Procedure. Rule 15 provides that leave to amend shall be freely given when justice so requires, and this seems to be an instance for a proper application of the rule, and good cause appearing therefor, the motion of the plaintiffs to amend the caption of the complaint by the substitution of the names of the three trustees of the Inland Empire Oil and Gas Syndicate, a Business Trust, for, and in the place of the Inland Empire Oil and Gas Syndicate, a Business Trust, is hereby granted. Notice thereof to be served upon the defendant herein. From receipt of notice hereof counsel may have twenty days on a side to serve and file briefs in respect to the motion now pending in said cause.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed October 8, 1947. [46]

[Title of District Court and Cause.]

ORDER

The court has had under consideration the consolidated motion by defendant, (1) for severance of claims contained in the complaint in above cause, (2) to dismiss for lack of capacity to sue, (3) to dismiss on ground of statute of limitations, (4) for a more definite statement, (5) and to strike certain parts of the complaint.

The motion was submitted on briefs, no reply brief having been filed. The court has considered the motion and complaint, the arguments and some of the statutes, authorities and rules cited by counsel for the respective parties, and being duly advised, is now of the opinion that the motion should be denied with the right reserved of renewal of said motion, or any appropriate subdivision thereof, at the trial of said cause, and such is the order herein, with twenty days to answer upon receipt of notice hereof. If in the meantime further proceedings are deemed desirable under other applicable rules of the Federal Rules of Civil Procedure, further extension of time to answer may be given upon the usual application and showing therefor. *Bowles v. Brookside, etc.*, 4 F.R.D. 294; *Slusher, et al., v. Jones, et al.*, 3 F.R.D. 168.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered April 7, [48]
1948.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, The Ohio Oil Company, a corporation, and reserving the right to renew its Consolidated Motion (or any subdivision thereof) heretofore filed herein, as provided in the Order of the Court of April 7, 1948, denying said Motion, makes this, its Answer, to Plaintiffs' Complaint herein, as follows:

First Defense

The Complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

I.

Defendant Admits the allegations contained in paragraphs I, II and III and IV of Plaintiffs' Complaint.

II.

Answering paragraph V of Plaintiffs' Complaint, Defendant Admits that on or about the 15th day of June, A.D. 1922, said Troy Sweet Grass Oil [50] Syndicate and the defendant, The Ohio Oil Company, made and entered into a certain writing denominated "Operating Agreement" and a certain writing denominated "Assignment," and that a true and correct copy of said Operating Agreement is attached to the Complaint and marked Exhibit "A," and a true copy of said Assignment is attached to

the Complaint and marked Exhibit "B" thereof, and defendant Denies generally each and every other allegation in said paragraph contained.

III.

Defendant Admits the allegations of paragraphs VI and VII of said Complaint.

IV.

Answering paragraph VIII of the Complaint, defendant Admits the allegations thereof, but Alleges that the Assignment therein referred to is not dated, but is acknowledged as of January 1, 1923, and that Inland Empire Oil and Gas Syndicate purchased its interest "as subject to the interest of The Ohio Oil Company," and that said Assignment specifically refers to the Operating Agreement attached to Plaintiffs' Complaint.

V.

Answering paragraph IX of the Complaint, defendant Admits the allegations thereof, but Alleges that in the assignment therein referred to dated August 18, 1923, Potlatch Oil and Refining Company "agrees to keep and perform the terms and conditions of all contracts and agreements of every kind and description by this instrument or otherwise this day transferred to" Potlatch Oil and Refining Company.

VI.

Defendant Admits the allegations of paragraph X of Plaintiffs' Complaint.

VII.

Answering paragraph XI, defendant Admits that all proceeds from the sale and marketing and disposition of oil and gas produced from said lands during defendant's possession of the lands were received in the first instance by defendant, The Ohio Oil Company, but defendant Denies generally each and every other allegation in paragraph XI contained. [51]

VIII.

Defendant Denies generally the allegations contained in paragraph XII of the Complaint.

IX.

Answering the allegations of paragraph XIII of the Complaint, the defendant Denies generally the allegations thereof, but in this connection, the defendant Admits that shortly prior to August 1st, 1925, the plaintiffs herein made certain protests and objections to certain of the charges contained in monthly statements rendered by defendant herein to plaintiffs showing its expenses and other results of its operation under the terms of said Operating Agreement and for the purpose of adjusting and settling said protests and reaching an agreement thereon, a conference was had between representatives of plaintiffs herein and representatives of the defendant herein at Shelby, Montana, on or about August 7, 1925, and as a result of said conference, it was agreed between plaintiffs herein and the defendant herein that Messrs. Freeman, Thelen and Frary, attorneys at law at Great Falls, Montana, and

attorneys for plaintiffs herein, would reduce to writing and send to defendant herein a statement of the items constituting the difference of opinion between plaintiffs and the defendant in the interpretation of said Operating Agreement and plaintiffs' objections to accounts theretofore rendered by the defendant in connection with its operations under the said Operating Agreement, and pursuant thereto the said Messrs. Freeman, Thelen and Frary, attorneys and agents for the plaintiffs herein, did reduce to writing and send to the defendant, on or about the 8th day of August, 1925, a written statement of the items in dispute, and thereafter on September 12, 1925, the defendant, through its Cashier, F. B. Firmin, replied to said Messrs. Freeman, Thelen & Frary showing the propriety of all charges and credits previously made by The Ohio Oil Company in the operation of said leases described in said Operating Agreement. A full, true and correct copy of said written statement from Messrs. Freeman, Thelen & Frary addressed to defendant under date August 8, 1925, is hereto attached and marked Exhibit "A" hereof, and a full, true and correct copy of defendant's reply thereto under date September 12, 1925, is hereto attached and marked Exhibit "B" hereof, [52] and defendant Alleges that after the explanation of charges contained in the letter of defendant's Cashier, a copy of which is hereto attached and marked Exhibit "B" hereof, the plaintiffs herein made no further objection or protest to defendant's monthly accounts or any of them for more than twenty years thereafter and

until the 8th day of July, 1946, and that during said entire period of time between the 7th day of August, 1925, and the 8th day of July, 1946, written statements were rendered monthly by defendant herein to the plaintiffs herein showing the actual cost and expense of defendant in developing and operating said lands and leases, and for those months wherein said statements showed a credit balance proper remittances were made to the plaintiffs herein of plaintiffs' share of the proceeds of oil and gas sold from said oil and gas leases operated by defendant under said Operating Agreement over and above the amount necessary to reimburse the defendant for expenditures made by it for the account and interest of the plaintiffs herein and said statements were received by the plaintiffs herein and said remittances were accepted by the plaintiffs herein without any objection to the correctness of the statements or remittances, and said statements and remittances were retained by the plaintiffs herein without any objection thereto until on or about the 8th day of July, 1946, and said remittances are still retained by plaintiffs and each of them, and by reason thereof, an account stated has been made and entered into between plaintiffs herein and the defendant herein and same has been settled by said monthly payments and remittances which accompanied said statements.

X.

Defendant Denies generally the allegations of plaintiffs' Complaint contained in paragraph XIV.

XI.

Defendant Denies generally the allegations in Plaintiffs' Complaint contained in paragraph XV thereof, save and except as heretofore expressly admitted.

XII.

Defendant Denies generally the allegations contained in paragraphs [53] XVI and XVII of Plaintiffs' Complaint.

XIII.

Defendant Denies generally each and every allegation of plaintiffs' Complaint herein not heretofore expressly admitted or denied.

First Affirmative Defense

Defendant Alleges that the plaintiffs herein had notice of all the facts and also the accounts of the defendant set forth in the Complaint and nevertheless refrained from commencing this action until the 18th day of March, 1947, and has thereby been guilty of such laches as should in equity bar the plaintiffs from maintaining this action; and in this connection, defendant Alleges that its representatives, F. E. Hurley and A. M. Sellery, who negotiated said Operating Agreement and Assignment of Leases, copies of which are attached to Plaintiffs' Complaint herein and marked Exhibits "A" and "B" thereof, respectively, died prior to the commencement of this action, the said F. E. Hurley, defendant's Vice President, having died at Findlay, Ohio, on or about the 27th day of July, 1928, and the

said A. M. Sellery having died at El Paso, Texas, on or about the 14th day of February, 1927.

Second Affirmative Defense

Defendant Alleges that the right of action, if any, set forth in Plaintiffs' Complaint herein did not accrue within five years next before the commencement of this action.

Third Affirmative Defense

Defendant Alleges that the right of action set forth in Plaintiffs' Complaint herein, if any, did not accrue within eight years next before the commencement of this action. [54]

Fourth Affirmative Defense

I.

Defendant Alleges that on or about July 5, 1922, the defendant, The Ohio Oil Company, pursuant to the terms of said Operating Agreement, copy of which is attached to Plaintiffs' Complaint herein, commenced the drilling of a well upon the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 35 North, Range 2 West (the Israel Sindon Oil and Gas Lease), known as the I. Sindon No. 1 well, and completed the same to the formation known as the Sunburst sand, on or about the 18th day of September, 1922, in a diligent and workmanlike manner to such depth as was deemed an adequate test of the oil and gas content of the first commercial oil sand, in compliance with the terms and conditions of said

lease, and defendant obtained therein a commercial gas well; and that thereafter, on or about the 15th day of October, 1922, the defendant, The Ohio Oil Company, commenced the drilling of a well upon the Irving H. Baker Oil and Gas Lease, known as Irving Baker No. 1 well, located on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, Township 35 North, Range 2 West, and defendant completed same to the formation known as the Ellis sand as a commercial oil well on or about the 27th day of January, 1923, and that at all times since the completion of said Irving Baker No. 1 well, the said Irving H. Baker lease has been developed and produced by The Ohio Oil Company and has produced oil in commercial quantities.

II.

That the plaintiffs herein, ever since the completion of said I. Sindon No. 1 well above mentioned, and ever since the completion of the above-mentioned Irving Baker No. 1 well above mentioned, have claimed to be and are and now claim to be the owners of interests therein under and pursuant to the terms of said leases and said Operating Agreement and Assignment of interests thereunder, copies of which are attached to Plaintiffs' Complaint herein.

III.

That pursuant to the terms of said Operating Agreement, the defendant herein, ever since the completion of the I. Sindon No. 1 well above mentioned [55] and the Irving Baker No. 1 well, above mentioned, has rendered to the plaintiffs herein

monthly statements showing the actual cost and expenses of developing and operating said lands and leases, and defendant has remitted to plaintiffs for those months wherein said statements showed a credit balance, all proceeds of oil and gas sold from the interest of the plaintiffs over and above the amount necessary to reimburse the defendant for expenditures made by it for the account and interest of the plaintiffs herein, and the plaintiffs herein at all of said times, through their duly authorized agents and representatives, had access to the buildings, lands and property mentioned in said Operating Agreement for the purpose of examining the operations thereunder and the production therefrom, and at all reasonable times during business hours, plaintiffs had the right to examine the books and records of the defendant insofar as they pertained to the operations conducted under said Operating Agreement, and during all of said time plaintiffs were duly acquainted with the actual costs and expenses of developing and operating said lands.

IV.

That during all of the time subsequent to the completion of the first commercial oil or gas well upon the premises described in said Operating Agreement, up to the 31st day of January, 1943, The Ohio Oil Company made full, true and correct monthly statements in writing to the plaintiffs herein which disclosed upon their face the total amount of monthly oil production from the lands described in said Operating Agreement and the

price at which the same was sold or accounted for, and the actual cost and expense of developing and operating said lands and leases, and for those months wherein said statements showed a credit balance, proper remittances for such payments were made by defendant to plaintiffs covering all proceeds of the oil and gas sold from the interest of plaintiffs herein over and above the amount necessary to reimburse the defendant for expenditures made by it for the account and interest of the plaintiffs herein. Said payments were made by check of The Ohio Oil Company drawn to the order of plaintiffs herein respectively under the terms of said Operating Agreement and were duly and regularly transmitted and received by the said plaintiffs, and this defendant [56] further Alleges that it made such statements and such payments during each and every month during said entire period last mentioned to the plaintiffs in the manner and for the price at which said oil and gas production was sold and accounted for, and said statements and payments so delivered and made as aforesaid by defendant, The Ohio Oil Company, were accepted and received by the plaintiffs without objection, protest or complaint, save and except for the objections and protests particularly specified in paragraph IX of the Second Defense herein, and said checks were presented for payment by the plaintiffs and the various amounts thereof were received by the plaintiffs, each of whom has ever since kept and retained the proceeds of said checks; that at the time of receiving said statements and payments

as aforesaid, the plaintiffs knew that this defendant, The Ohio Oil Company, had made the charges and incurred the costs and expenses complained of in plaintiffs' Complaint herein, and that deductions were made by this defendant, The Ohio Oil Company, for the purpose of defraying and liquidating plaintiffs' proportionate share of such costs, expenses and charges.

V.

That by the acceptance of said statements and payments and the retention of the said monthly payments for oil and gas purchased or sold by this defendant, The Ohio Oil Company, and by reason of each and all and every of the matters and things heretofore in this separate defense set forth, said plaintiffs are now and forever ought to be estopped from denying the right of this defendant, The Ohio Oil Company, to make the charges, costs and expenses plainly set forth in said monthly statements and the deductions for charges, costs and expenses of operations as set forth therein, and plaintiffs ought to be estopped from claiming or demanding reimbursement for such deductions or any part thereof, or from asserting any indebtedness owing from defendant to plaintiffs herein by reason of such deductions, or any part thereof, as in Plaintiffs' Complaint set forth and alleged or otherwise, or at all. A full, true and correct copy of the monthly statement rendered by defendant herein to the plaintiff, Potlatch Oil & Refining Company, for the month of June, 1927, showing the costs,

charges and expenses of development and operation of [57] the said properties described in said Operating Agreement and receipts from oil and gas produced therefrom, is hereto attached and marked Exhibit "C" hereof, and a similar statement was made and rendered for the same month by the defendant to Inland Empire Oil & Gas Syndicate, and this defendant Alleges that similar monthly statements in substantially the same form as to subject matter and differing from Exhibit "C" hereto attached only as to the month in question and the amounts of oil or gas produced and sold and amount of payments received from same and costs and expenses of development and operation, were rendered and delivered to plaintiffs during each of the months between the date of the completion of the first commercial oil or gas well and the 31st day of January, 1943, all of which statements showed upon their face the actual costs, charges and expenses of developing and operating said lands and leases and all proceeds from the sale of oil or gas produced or sold from said premises and the share of the respective plaintiffs therein for those months where said statements showed a credit balance, each of said statements was accompanied by a check remitting to each of the plaintiffs herein the amount of such proceeds payable to each plaintiff at the date of such monthly statement, and all of said statements were accepted and retained by the plaintiffs herein and all of said monthly payments were accepted and retained by plaintiffs herein, and defendant Alleges that the total amount of such pay-

ments remitted to plaintiffs herein by the defendant between the date of the completion of the first commercial oil or gas well under the terms of said Operating Agreement and the 31st day of January, 1943, equalled or exceeded the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00).

Wherefore, the defendant, demands Judgment against the plaintiffs herein, and that the plaintiffs' action be dismissed upon the merits and that this defendant have and recover from plaintiffs its costs of action.

W. H. EVERETT,
Attorney for Defendant,
The Ohio Oil Co.

LOUIS P. DONOVAN,
Attorney for Defendant,
The Ohio Oil Co. [58]

EXHIBIT "A"

August 8th, 1925.

Ohio Oil Company,
Casper, Wyoming.

Attention: Mr. Firmin:

My dear Mr. Firmin:

Pursuant to the conference had at Shelby yesterday between yourself, representing the Ohio Oil Company; Mr. Wilson, president of the Inland Empire Oil Syndicate, a common law trust, and Mr. Jones, president of the Potlatch Oil and Refining Company, a corporation, and the writer of

this letter, as the attorney for the last mentioned associations, concerning the dispute which has arisen over the interpretation of the agreement dated June 15th, 1922, entered into by and between the Troy-Sweet Grass Oil Syndicate, a common law trust, and the Ohio Oil Company, a corporation, and at which conference I agreed to reduce to writing and send to you a statement of the more important items of this difference of opinion.

Under the terms and conditions of said contract, we most respectfully insist that the Ohio Oil Company in the operation of what is known as the Baker Lease covering the

Southwest quarter (SW $\frac{1}{4}$) of Section Three (3);

Southeast quarter (SE $\frac{1}{4}$) of Section Four (4);

Township Thirty-five (35) North, of Range Two (2), East of the Montana Meridian,

has no right or authority under the terms of said contract to charge against said lease the following items:

(1): No part of the expense for the construction or operation of the Sunhio Water Plant, which amounts to approximately \$37,000.00 and that the associations we represent be credited back with that amount of money.

(2): That under the terms of said contract, you have no right or authority to charge a ten per cent overhead charge against said lease and that this

amount of ten per cent be credited back as above indicated.

(3): That under the terms of said agreement, you have no right or authority to charge any field auto expense against said lease and that the various amounts heretofore charged against said lease for field auto expense be credited back.

(4): That under the term of said contract, your company has no right to charge against said lease any part of the construction cost of what is known as the Main Swayzee Camp.

(5): That under the terms of said contract, the Inland Empire and the Potlatch Oil Company are entitled to additional credit of ten cents per barrel on all oil sold since June 15th, 1925, in addition to the amount heretofore credited them on the sale of oil, June 15th, 1925, being the date on which the International Refining Company entered said field and has been paying at all times since for any and all oil delivered to it a price amounting to ten cents in excess of the Field posted price in the Kevin-Sunburst Field.

The terms of said agreement provide that the Ohio Oil Company shall market all oil or gas produced from said above-described lands and account to the Troy-Sweet Grass Oil Syndicate, of which the Inland Empire and the Potlatch Company are the successors in interest, for an undivided forty-five per centum (45%) of the proceeds thereof, at the prevailing market price at the wells for said oil, after [59] deducting all royalty oil and gas or

the proceeds thereof. That the Ohio Oil Company shall be reimbursed for its expenses in the drilling of said wells solely from the Inland Empire's and Potlatch Oil Company's proportion of the oil and gas produced and sold from said land. The contract also provides that the first well drilled shall be, what is known as, a "Free Well" and that in the event it shall prove to be a commercial well that the Ohio Oil Company shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and as is consistent with good business management. That it will pay all costs and expenses of developing and operating said land as provided in said contract and charge the party of the First Part forty-five per centum (45%) thereof.

In the conversations leading up to the signing of said agreement, Mr. Jones, who was president of the Troy-Sweet Grass Oil Syndicate, and Mr. Wilson and several other persons who were interested in said syndicate, brought up with the representatives of the Ohio Oil Company, the question of what should be included in the cost that could be charged against the Troy-Sweet Grass Oil Syndicate, and insisted that there should be no charge made against the said Troy-Sweet Grass Oil Syndicate and its successors and in interest, save and except the actual expense incurred on the lease itself as they had been informed that in these operating agreements unless otherwise provided charges similar to the ones hereinabove objected to were commonly charged by the operating company,

which would be the Ohio Oil Company in this case. It was agreed by the representatives of the Ohio Oil Company that the charges that could be made against the Troy-Sweet Grass Oil Syndicate were simply the charges and expenses incurred within the four corners of the lease. Afterwards, when said written agreement was brought back for the purpose of being signed, Mr. Jones, and his people had their attention called to the following phrase in said written agreement:

“But in no case shall said party of the First Part be finally held or charged beyond its share of interest in the production and equipment from, in or upon said lands”;

and after reading the same, they believed that it conveyed the meaning which they had heretofore agreed upon in the oral negotiations that this phrase would only permit the Ohio Oil Company to charge against the Troy-Sweet Grass Oil Syndicate and its successors in interest the charges and expenses of production and equipment that should be incurred on, in or upon said land; and in consequence of which, Mr. Jones signed said agreement, as President and Mr. Harsh attested the same, as Secretary of the Troy-Sweet Grass Oil Syndicate, a common law trust.

The foregoing items all relate to the question of what items and expenses can be charged by your company against the Potlatch and the Inland people under the terms of said contract, except number

five. It is but opinion that a judicial interpretation would sustain the contention of our people.

In addition to the foregoing objections to the interpretation of said contract by the Ohio Oil Company, we also have the further following items;

(6): You have charged against said lease, a price of \$2.00 per foot for the use of your own tools in drilling several wells on the Baker lease. This charge in our opinion is thoroughly excessive and that the practically universal price in the field, outside of yourself, for the use of tools is not to exceed \$1.00 per foot and we should receive a corresponding credit.

(7): An examination of your records shows that you have reported that the cost of the nine wells on the Baker lease averages \$14,800.00. I believe that you will not deny that under the terms of said agreement you are charged with good business management and from an examination which has been made in the field we are thoroughly convinced that under no circumstances had these wells ought to exceed an average cost price of \$10,000.00. In any event, there should be a rebate of not less than four thousand dollars on the average cost of each of said nine wells. [60]

From the experience of the writer of this letter and from the practically universal statements of the operators in the Kevin-Sunburst Field, it would seem that the average cost of these nine wells is on the average of more than four thousand dollars over and above the amount for which said wells

could have been drilled by the exercise of proper business management.

(8): You made a net return to the State of Montana on the net proceeds tax under the laws of this state and paid the state the sum of \$831.45 as and for the year 1923. You understand that this is a tax entirely separate and distinct from the production tax levied by the state; and we most strenuously insist that you have no right or authority under the law to make any such return with reference to the net proceeds of either one of these companies by the reason of the fact that these companies have other leases and other operations which must be taken into consideration in the making of their net proceeds tax; and your action makes it impossible for us to keep from paying more than we are entitled to pay under the law of this State. We have read the letter addressed to your Company at Findlay, Ohio, for the attention of Mr. Billstone written by the State Board of Equalization of this state in which the state board says that they want you to make a one hundred per cent statement in those cases where you have only a working interest. We call your attention to the following paragraph in the closing part of this letter, which reads as follows:

“We may be wrong in our viewpoint, but we request that you make the returns as above suggested and take the matter up later before the full board if desirable.”

This letter is intended as an absolute demand

that insofar as the Inland Empire and the Potlatch people are concerned, you pay no attention to this letter, as we insist that you have the right to make our own net returns, including any money received from your company as well as from other sources. We do not believe that the law of the State of Montana can in any way hold you liable to the State of Montana even though our companies neglected or failed or refused to pay their net income tax to the state. However, if your legal department should insist that they have in their mind any serious doubt upon that question, we are perfectly willing for your company to hold back such an amount of money on our account as will protect you providing that our companies, or either one of them should fail or neglect to make or pay taxes due the state, until such time as proof has been submitted to you that both of these companies have fully complied with the laws of the State of Montana in that respect.

You can see without further elucidation the inequitable position we are placed in by such a procedure.

I believe that the foregoing embraces all of the points taken with you verbally at Shelby, Montana, yesterday, covering the main points of the contention upon our part with reference to the interpretation placed on said operating agreement by your company. As I understand from your conversation after further investigation upon your part you will communicate with me further concerning this matter.

Trusting that we may be favored with as early a reply as is consistent with the investigation made by you, we remain

Respectfully,

FREEMAN, THELEN & FRARY,

By /s/ J. W. FREEMAN.

JWF:dr. [61]

EXHIBIT "B"

The Ohio Oil Co.,
Casper, Wyoming.

September 12, 1925.

Freeman, Thelen & Frary,
Attorneys at Law,
Great Falls, Montana.

Attention: Mr. J. W. Freeman.

Gentlemen:

On August 5th, you wrote us relative to a dispute which has arisen over the interpretation of the operating agreement of June 15, 1922, between the Troy-Sweet Grass Oil Syndicate and The Ohio Oil Company. You set forth the important items involved in this difference of opinion.

I apologize for not having replied to your letter sooner but it was necessary that I await the arrival of Mr. Hurley from Findlay, Ohio, in order that we might have a general conference about the entire matter. Just yesterday we concluded our consideration of the different contentions made by you

in your letter, and in order to cover them fully I shall discuss them in the same order that you followed.

You stated:

(1) That in the Operation of What Is Known as the Baker Lease, the Ohio Oil Company Has No Right or Authority to Charge Against Said Lease. The Expense for the Construction or Operation of the Sunhio Water Plant, Which Amounts to Approximately \$37,000.00, and You Asked That the Associations You Represent Be Credited Back With That Amount of Money.

It must first be borne in mind that the agreement of June 15, 1922, obligates The Ohio Oil Company to develop and operate the Baker lease for oil and gas purposes and do so in a diligent and business like manner. It must also be borne in mind that this lease is surrounded by other acreage under lease and under development for oil and gas and that, by reason of development on said adjoining lands it has been necessary to vigorously develop and operate the Baker lease. It should not be disputed that water is an absolute necessity in the development and operation of any tract of land for oil and gas. In the early development of the Baker land, water in the vicinity thereof was extremely scarce and very expensive to obtain. The Sunburst Oil and Gas Company held the key to the water situation by owning or controlling a number of reservoirs. The Ohio Oil Company succeeded in making arrangements with the Sunburst Oil and

Gas Company to take over the management and control of these various water reservoirs and thereafter this business was also known as the "Sunhio Water Account." The arrangements between the two companies was that each should have the right to take water from the various reservoirs for operating purposes on lands being developed by or for the two companies. Neither company has the right to exhaust the water from one reservoir or another, but each must take the same on a fair and equitable basis. The Baker farm proved to be productive of oil in commercial quantities, and, in order to develop said tract of land in good and business-like manner, it became necessary to secure an adequate supply of water. In view of the fact that The Ohio Oil Company was developing and operating other lands in the general vicinity of the Baker land, it decided to construct a general pipe line system and connect all leases with the various reservoirs containing water in that general vicinity. This pipe line system, of course, involved the main transportation line and branch lines on the various farms. Most of the pipe is 3", with some 4" being used at particular points. The Baker farm has only been charged with its proportionate part of the entire cost of the general transportation system. Since the Sunhio Water Account does not involve anything other than the maintenance of the reservoirs, in order to afford an adequate supply of water for drilling and operating purposes, it became necessary to construct pipe lines for the transportation of

water from the source of supply to the leased premises, wherever said premises might be located. [62] Therefore, it was simply a question of whether or not it would be cheaper and better to construct a general pipe line system for the purpose of serving all the farms under development and operation by The Ohio Oil Company, or to construct separate lines for the various reservoirs to each lease. We chose the former method because it is far superior to the latter from the standpoint of giving service and for the further reason that it is less expensive. It can not be disputed that a better and more adequate supply of water can be secured through a 3" pipe line than a 2" line. No one can successfully contend that the Baker farm or any other farm can be properly developed and operated with less than a 2" line, at the time these lines were constructed, water was scarce and we were wholly dependent upon the same for development for drilling purposes as well as operating purposes. Consequently the main question involved in your first contention rests primarily upon whether or not water was a necessity; and, if so, the means of securing the same was up to The Ohio Oil Company under its contract. It arranged to secure water from the best and most adequate water supply in the vicinity of the Baker lease and decided that the system it employed was the best for all concerned and likewise the cheapest. The sum of \$37,000.00 which has been charged, not only covers the cost of the pipe lines for the transportation of water, from the reservoirs or source of supply to the Baker lease, but likewise

covers the cost of the branch lines on the Baker lease and the cost of the water itself. Perhaps a comparison of the cost of pipe lines direct from the Baker farm to the various reservoirs, with the cost of the system that was installed, would be enlightening. If a pipe line had been constructed from the Baker farm to the source of water supply for the purpose of serving that farm alone, we might have built said line out of 2" pipe instead of 3" and 4"; We have found that the cost of 2" pipe line for the purpose of serving the Baker farm alone would have cost the farm approximately \$44,000.00, which does not include the water equipment, and pipe lines actually on the farm. This 2" pipe line would connect the Baker farm with the Davey and DeWald reservoirs to the northeast and the Pewters and Simmerman reservoirs to the southeast. You may ask why we would have constructed a 2" line to these various reservoirs, and the answer is that, under the arrangement we are able to make with the Sunburst Oil and Gas Company, each company had the absolute right to draw from all of said reservoirs for water but neither company had the right to exhaust any one reservoir or even take any definite and certain amount of water therefrom. In other words, the various reservoirs furnished the source of supply and water could only be taken from the entire supply on a uniform basis. Consequently, if we had connected the Baker farm with the Davey reservoir alone (it being the nearest one), we would no doubt have experienced the situation of being without water at some time or other,

to say nothing of the fact that we were not able to make that kind of arrangement. No competent operator would have dared rely upon one reservoir for a source of water supply, but on the contrary any competent operator, in the exercise of good business judgment would, under the circumstances, connect the farm with the four reservoirs mentioned in order to be in a position at any and all times to adequately and properly take care of the required development and operation of the lease.

By the comparison of costs, you can readily see that the plan that was adopted and followed by the Ohio Oil Company has proved more economical in the development and operation of the Baker Farm to date.

(2) That Under the Terms of Said Contract, We Have no Right or Authority to Charge a 10% Overhead Charge Against Said Lease and That This Amount of 10% Credited Back.

This charge involves a universal custom in the business. It is a necessary charge against any part-interest owner, whoever he may be, for, without question, such part-interest owner should contribute some part of the outlay that overhead is intended to cover. The contract required The Ohio Oil Company to manage and develop these lands in a good and business-like manner, and The Ohio Oil Company is a corporation made up of many officials whose duties are to properly supervise and manage the business of developing and operating oil lands; and while they do not devote their entire time to

the development and operation of any one [63] lease, and while said company does not use its entire organization to develop and operate any one lease, nevertheless said organization as a unit is serving each and all tracts of land under development. Our contract contemplates and requires that that organization look after and supervise the development of this particular tract of land. The Company has available in the field at its camp all kinds of tools and machinery required in the development and operation of oil lands generally and, while a complete set of such tools cannot be charged to any particular farm, on account of excessive investment, nevertheless, by having the same, it is in position to render more valuable service in the development of said lands than otherwise, for which overhead should properly be allowed. Our contract provides that we must account to the part-interest owner for all expenditures and all receipts. This requires the use of an accounting department; and while we have not employed separate accountants to look after each and all of these details, which, if done, would be chargeable against the part-interest owner, nevertheless, our general accounting department has rendered this service. In other words, we could go on step by step showing wherein this official, or that one, this department, or that one, and this equipment or that, does in fact render some valuable service to the entire enterprise of developing and operating these particular lands; that these are necessities and are in fact required and expected under the scope of this contract as

well as that of any other contract of similar purpose. Therefore, it would seem reasonable to assume that the only question that could arise under this contract (and under this particular contention), is whether or not 10% is a fair and reasonable overhead charge. Our experience has taught us that it is. The experience of many other operators throughout the United States engaged in similar business has taught them that 10% is a fair charge. Other industries, such as railroad, etc., make a similar charge. Just as an isolated example, and one that we feel you will appreciate. You know that Mr. McFayden has, as General Manager of The Ohio Oil Company of this region, devoted considerable of his time to supervising the business of developing and operating lands in the Kevin-Sunburst field; that he has devoted considerable time to the development and operation of the Baker lease—yet his salary or no part thereof has been charged to the Baker farm. However, the 10% overhead charge is intended in part, to cover that service rendered.

(3) That Under the Terms of Said Agreement, We have No Right or Authority to Charge Any Field Auto Expense Against Said Lease and That Various Amounts Heretofore Charged Against Said Lease for Field Auto Expense Be Credited Back.

In investigating this item, we find that the Baker Lease has been charged with a proportionate part of the auto expense of four cars; that of Mr. Yealy, the Superintendent, and three cars used by men in the field who are required to travel from one lease

to another. The entire charge amounts to about \$600.00 a month and is apportioned between the various farms on a per well basis. With 40 producing wells, 9 of which are on the Baker farm, we have charged your farm with 9/40 of that expense, and, of course, your proportion is 45% of that charge. The whole thing amounts to less than \$60.00 a month. It can not be disputed that those cars are actually serving the Baker lease. The charge involves only the maintenance and depreciation. Certainly when you stop to realize that these cars are actually serving this farm in the manner hereinbefore described, you should realize that the charge is very reasonable.

(4) That Under the Terms of Said Contract, This Company Has No Right to Charge Against Said Lease Any Part of the Construction Cost of What Is Known as the Main Swayzee Camp.

It must be borne in mind that in the development and operation of the Baker lease it has been necessary to use certain buildings, such as bunk-houses, cook-houses, wash-houses, tool-houses and blacksmith shop, for the purpose of housing and feeding the workmen and performing certain duties incident to general development and operating work. We do not believe that your objection challenges this [64] necessity, but rather challenges the right of the company to charge this lease with a proportionate share of the main camp in the field. The main Swayzee Camp was constructed for the purpose of developing and operating all the leases in the vicinity and to eliminate the necessity of building small camps upon each lease. Experience has taught us that a

main camp is much more economical and gives the company an opportunity to render a greater degree of efficiency in development work. We have made a comparison of the cost of a camp on the Baker farm with your part of the cost of the Swayzee camp. We find that you have been charged approximately \$4,500.00 whereas we find that it would have cost approximately \$10,000.00 to have placed on the Baker farm a camp large enough to have successfully and properly developed and operated said lands. This camp would have required the construction of four bunk-houses at a cost of approximately \$3,600.00; one cook-house, \$1,200.00; one wash-house, \$1,500.00; one tool-house, \$2,200.00. The Swayzee camp has been actually used for the purpose of assisting in the development and operation of the Baker lease and no separate camp has been constructed upon the Baker farm. We believe the figures above set forth should indicate the fairness of the system that has been followed.

(5) That Under the Terms of the Contract, the Inland Empire and Potlatch Oil Companies Are Entitled to an Additional Credit of 10c Per Barrel on All Oil Sold Since June 15, 1925, in Addition to the Amount Heretofore Credited Them on the Sale of Oil (June 15, 1925), Being the Date on Which the International Refining Company Entered Said Field and Has Been Paying at All Times Since for Any Oil Delivered to It, a Price Amounting to 10c in Excess of the Posted Price in the Kevin-Sunburst Field.

You quote from the lease which provides that you

are to receive payment on a basis of the prevailing market price at the wells for said oil.

On this question, we believe that the contract is conclusive of this matter. That is, it provides for an accounting on the basis of the prevailing market price at the wells, and this price, as you know, is posted regularly when a change is made in the same. The ten cents in excess thereof is merely a premium paid by the International Refining Company. It is not, under any circumstances, the field posted price or the prevailing market price. In fact, it is necessary before ascertaining what price the International Refining Company shall pay, that it shall first know the field posted price or the prevailing market price at the wells. We understand that the International is now purchasing some of the royalty oil from the Baker farm, and in its contract it provides that it shall pay ten cents per barrel at all times over and above the Posted Field Market Price as Fixed and Posted in the Kevin-Sunburst Oil Field by the Ohio Oil Company or the Illinois Pipe Line Company. In order to entitle your clients to receive an accounting because of the premiums paid, it would be necessary for our contract to contain language specifying that they should receive the proceeds on the basis of the prevailing market price at the wells for said oil and, in addition thereto, any premium that is paid by any other bona fide purchaser of oil in the field. Without a prevailing market price to be used as a basis, The International is unable to figure the price that it shall pay, and we therefore, cannot

see where this contention is fair or reasonable within the meaning of the agreement.

Under your fifth contention, you further specify that it was discussed between your clients and representatives of this company, prior to the signing of the agreement, that the Troy-Sweet Grass Oil Syndicate should only be charged with the actual expense incurred within the four corners of the lease.

We contend that all charges that have been made are in fact for the actual benefit of this lease and that it is physically impossible to endeavor to draw and establish a mental or imaginary line around the four corners of this lease in order to determine the amount of money that shall be charged for the development and operation thereon. The real fact in the case is that the joint interest owners shall be responsible for 45% and 55% respectively of all charges incurred in the development and operation of said lands. It cannot make any real difference [65] whether certain work is performed off the lands or not, provided said work actually and in fact does benefit said lands. It would be impossible to do and perform each and every act required in the development of oil and gas on this lease, within the four corners thereof. Take the water line for example. One might easily find that he had no water supply within the four corners of the lease and yet it is impossible to operate a lease without water and consequently the operator would be required to haul water from other lands by the use of a tank wagon or any other facility or by use of a pipe line from other premises, and, if your contention in this case is

correct, The Ohio Oil Company would not be permitted to charge you for any expense incident to that pipe line after it left the boundary line of your lease, although you can easily see that it is imperative that some means be used to convey water from other land to the leased premises. Again, drilling equipment might need repairing, for example and according to your contention, it would be necessary for The Ohio Oil Company to perform that work upon the lease or else not charge you for it. The representatives of the Ohio Oil Company who made this contract with your clients do not recall any conversation relative to making charges against the Troy-Sweet Grass Oil Syndicate for the actual amount of expenses incurred on the lease itself, or as you say within the four corners thereof. The quotation that you make is not applicable to the question here involved, for the reason that that is a clause stating that The Ohio Oil Company shall look to the proceeds belonging to the Troy-Sweet Grass Oil Syndicate, in order to reimburse itself for the cost of developing and operating said lands, and that if said proceeds were insufficient to fully reimburse it, that it would be then required to stand the deficiency itself. In other words, this was and is a contract wherein The Ohio Oil Company was obligated to take all the chance incident to the development and operation of the leased lands and should look solely to production and equipment for reimbursement. We believe that the contract is a fair one and that what the Troy-Sweet Grass Oil Syndicate desired at the time the agreement was made

was the development and operation of said land for oil and gas purposes. They did not discuss with us nor did they express themselves in the light that the only expense chargeable to them would be the expense incurred within the four corners of the lease. We contend that we have at all times developed and operated this land in an economical and business-like manner, having due regard to all the existing circumstances.

(6) That We Have Charged the Lease With a Price of \$2.00 Per Foot for the Use of Our Own Tools in Drilling Several Wells: That in Your Opinion the Charge Is Excessive on the Ground That the Universal Price in the Field for the Use of Tools Is Not to Exceed \$1.00 Per Foot and That You Should Receive a Corresponding Credit.

We beg leave to advise that we have charged for the use of our own tools for drilling done under labor contracts on the Baker lease the actual amount that is charged throughout the field for the use of such tools; that our price is merely the difference between a drilling contract, whereby the contractor furnishes all the tools, and a labor contract, whereby the contractor does not furnish any of the tools. In other words, it was possible at the time the wells were drilled with the company tools, for an operator to make a contract for the drilling of a well at \$4.00 per foot and the contractor furnish all the tools; and it was also possible for an operator to make a contract for the drilling of a well at \$2.00 per foot and the operator furnish all the tools. We believe

that if you will look into this matter, you will find our statement to be correct and sufficient to convince you that we have not made an overcharge for the use of our own tools used in the drilling of wells under labor contracts on the Baker lease.

(7) That an Examination of Our Records Shows That the Average Cost of the 9 Wells Drilled on the Baker Lease Was \$14,800.00; That the Same Should Only Have Cost an Average of \$10,000.00; You Therefore Request a Rebate of Not Less Than \$4,000.00.

It is almost next to impossible for any operator to determine in advance what an oil well will cost to drill. However, we are satisfied that the wells on the Baker lease that have been drilled by us or for us have cost in no cases more than was absolutely necessary under all the circumstances. Regardless of whether or not other wells on other lands have been drilled for \$10,000.00 per wells, we contend that the cost involved is determined solely from the facts and circumstances existing in each particular case. Possibly you are not aware of the fact that drilling on the [66] Baker farm is different and more expensive than in many other parts of the field. We always employed the very best of the contractors and drilled some of the wells in the early days of this field when drilling was more expensive than now, and any fair minded man with knowledge of the facts will tell you that the amount that it cost The Ohio Oil Company to drill these nine wells is not excessive. We would be perfectly willing and glad to go over our expenses incident to the drilling of these

wells and also the logs of these wells and show you what was done in each case, in an effort to satisfy you that no advantage has been taken of you and that none was ever contemplated by us.

(8) That We Made a Net Return to the State of Montana, on the Net Proceeds Tax for 1923 on a Basis of 100% Return, and That Our Action Makes It Impossible for You to Keep From Paying More Than You Are Entitled to Pay Under the Law of the State.

You indicate that you are familiar with all the facts and circumstances incident to the return that we made. We confess that the matter of tax returns, under the regulations of the Board, was somewhat complicated. At the same time, if it could be shown that the return we made was not a 100% return, we can see no reason why the Board should object to allowing you to make a supplemental return and thereby secure and derive the benefits that you claim to be entitled to but did not receive. However, we are perfectly willing to endeavor to work out some plan that will be mutually agreeable; and in this connection we invite you to make some suggestions as to the proper method to be followed in making net proceeds returns.

We are very sorry to find that your clients feel that some advantage has been taken of them and we earnestly hope that the explanations that we have given here will at least be a starting point towards convincing them that everything that the Ohio Oil Company has done in connection with the develop-

ment and operation of the Baker lands has been fair and reasonable. We regret exceedingly to have you make the statement that The Ohio Oil Company has not performed the work required of it under the contract in a good and business-like manner. From our experience in developing and operating oil land all over the country, we have demonstrated that the methods and practices of this company, over the life of a lease or field, are far more economical than the methods employed by many other operators. We feel confident that the management of the Baker lease has been above the average.

We trust that you will consider your various objections in the light of the explanations herein contained.

Very truly yours,

/s/ T. B. FIRMIN,
Cashier. [67]

EXHIBIT "C"

Form 350

Findlay, Ohio, June 30, 1927

Bill No. W-1092-27

Potlatch Oil & Ref'g Company

Baker & I. Sindon

In Account With The Ohio Oil Co.

Summary

Oil Expense		195.52
10% of above—Overhead Expense.....		19.55
Service Department		93.48
Gas Sales	10.83	
Other Income	29.73	
Oil Credits	2,764.24	2,804.80

Net Credit balance during June, 1927..

2,496.25

Calculations Checked.

Office Copy. July 28, 1927. [68]

Form 350

Findlay, Ohio, June 30, 1927

Bill No.

Potlatch Oil & Rfg. Co.
In Account With The Ohio Oil Co.

Sheet #1

Detailed Statement of Oil Expense
Irving H. Baker Farm

Foreman: Labor.

		Gross	Your 22½%
9/75 of 15 days @ 250.00 per mo.....	15.00	.....	.....
9/75 of 15 days @ 250.00 per mo.....	15.00	.....	.....
Expense on field autos 9/76 of 900.00.....	106.58	136.58	30.73

Pumping labor.

30 days pumping @ 4.25.....	127.50	.....	.....
30 days pumping @ 4.25.....	127.50	255.00	57.37

Repairs Well Equipment: Labor.

12 days pull, run & fish rods & tub. @ 4.25	51.01	.....	.....
6 days pull & fish rods & tub. @ 5.00.....	30.00	.....	.....
2 days pull & run rods & tub. @ 4.00.....	8.00	89.01	20.02

Repairs Well Equipment: Tmg. & Trkg.

5 days pull & fish rods & tub. @ 12.00.....	60.00	13.50
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Repairs Well Equipment: Material

10 13/8" Lubricups.....	1.90
10 11/4" Superior cups.....	2.30
4 11/4" Superior cups.....	.88	.....	.....
6 9/16" stfg. box rings—rubber.....	.36	.....	.....
12 15/8" valve cups.....	2.78	.....	.....
Carr. overcharge on 17/8" sucker rod elevator in May	14.59	6.45	1.45

Repairs Surface Equipment: Labor.

1½ days rep. water line & start eng. @ 5.50.....	8.25	.....	.....
6 days repair lines & keep time 4.00....	24.00	.....	.....
3½ days rep. lines & eng. @ 4.25.....	14.87	.....	.....
2½ days rep. water line & pain Pewter Pr. @ 4.25.....	10.63	.....	.....
1 day rep. eng. block brakes.....	4.00	61.75	13.89

Repairs Surface Equipment: Tmg. & Trkg.

Haul 2 tanks water.....	12.00	.....	.....
3 hr. haul eng. cylinder @ 3.50.....	10.50	.....	.....
Ditching lead line—450 ft. @ 20¢ ft.....	90.00	.....	.....
1½ days filling ditch @ 17.00.....	25.50	.....	.....
Filling ditch—450 ft. @ 1½¢ ft.....	6.75	144.75	32.57

Total Sheet #1..... 166.63

Form 350

Findlay, Ohio, June 30, 1927

Bill No.

Potlatch Oil & Rfg. Co.
In Account With The Ohio Oil Co.

Sheet #2

Oil Expense Continued

Irving H. Baker Farm

Repairs Surface Equipment : Material.	Gross	Your 22½%
2 2" x 1½" C. I. Bushing.....	.16	.....
2 ⅜" collars .....	.10	.....
2 ¼" x 2" nipples.....	.04	.....
1 2" I. B. Stop.....	1.77	.....
10 gal. Battleship gray paint.....	27.70	.....
1 ⅜" Br. air cock.....	.16	.....
1 ⅜" angle valve.....	.47	.....
1 ⅜" #2 sight feed oil cup.....	1.83	.....
1 #63 driving bar spring guide.....	.37	.....
1 #46 driving bar spring.....	.07	.....
1 #44 roller pin.....	.15	.....
1 #8 latch spring.....	.06	.....
16 yds. sand & gravel @ 50¢.....	8.00	.....
1 1½" C. I. plug.....	.04	.....
1 1 Boson lubricator.....	7.81	.....
4 2" x 4" nipples.....	.40	.....
2 2" x 2" nipples.....	.14	.....
2 1" x cl. nipples.....	.04	.....
2 hr. cutting on volume tanks @ 3.50....	7.00	.....
2½ hr. welding volume tank @ 3.50.....	8.75	.....
2 Wrenches & 1 hammer.....	3.48	67.94 15.29

Supplies.

1 #1 Toledo pipe stock & dies.....	29.40	.....	.....
1 24" Trimo wrench.....	2.39	.....	.....
20# White waste.....	3.80	.....	.....
1 5 gal. W. J. oil can.....	.82	.....	.....
1½ hr. weld 2" beamer stock.....	3.00	.....	.....
5 gal. Capitol St. cyl. oil @ 64¢.....	3.20	.....	.....
30 Gal. std. gas eng. oil @ 57¢.....	17.10	.....	.....
2 #6 Col. dry cells.....	.74	60.45	13.60

Total Sheet #2..... 28.89

Summary

Total Sheet #1.....	166.63	.....
Total Sheet #2.....	28.89	.....
Total Oil Expense.....	195.52	

Form 350

Findlay, Ohio, June 30, 1927

Bill No.

Potlatch Oil & Refining Company
In Account With The Ohio Oil Co.

Service Division Summary

Investment:	11.99	.....
Swayze Camp	11.99	.....
Expense:	89.87	.....
Swayze Camp	89.87	.....
Income: Swayze Camp.....	8.38	8.38
Net Total	93.48	.....

Form 350

Findlay, Ohio, June 30, 1927

Bill No.

Potlatch Oil & Refining Company

OK H. J. Allen

In Account With The Ohio Oil Co.

Detailed Statement of Camp Investment

		Gross	Your Int.
Swayze Camp:			
6 Blankets	3.00	18.00	.....
2 Hrs. making grate for incinerator.....	2.00	4.00	.....
5 Hrs. cut & weld burner for incinerator	3.50	17.50	.....
1 Hr. making grate for incinerator.....	2.00	2.00	.....
2 Hrs. making grate for incinerator.....	2.00	4.00	.....
1 Hr. making hinges for incinerator.....	2.00	2.00	.....
25 Sacks cement.....	5.25bbl	32.80	.....
4 Sax fire clay.....	2.50	10.00	.....
10% Discount on 42.80.....		4.28	.....
Reimburse P. R. Nason for 4 blankets returned	3.87 $\frac{1}{2}$	15.50	.....
1 Day laying gas line to incinerator.....	4.25	4.25	.....
9 Hrs. hauling dirt from incinerator.....	3.50	31.50	.....
To bedding sold during June, 1927.....		41.22	.....
1 1 $\frac{1}{4}$ x 1" C. I. Bushing.....	.04	.04	.....
2 1" Collars .....	.15	.30	.....
2 1 x 2" Nipples .....	.03	.06	.....
1 2 x 4" Nipples.....	.10	.10	.....
4 1 x 4" Nipples.....	.04	.16	.....
3 1" Ells.....	.08	.24	.....
1 1" I. B. Globe Valve.....	1.55	1.55	.....
3 1" Tees .....	.08	.24	.....
2 1" R. R. Lip Unions.....	.23	.46	.....
2 1 x 8" Nipples.....	.08	.16	.....
2 Hrs. hauling dirt for incinerator.....	1.50	3.00	.....
To bedding sold during June, 1927.....		6.00	.....
To charge blksmith shop labor in bldg. incinerator. This labor chgd to ex- pense May, 1927 in error.....		75.40	.....
Total		171.76	.....
Your interest 6.9813%.....			11.99

Detailed Statement of Camp Expense
Swayze Camp

			Gross	Your Int.
1	Myers Pump.....		5.68	.....
10	Yds. sand & gravel.....	.50	5.00	.....
200#	White lead.....	19.80 cwt	39.60	.....
1	Gal #3 Wall paint.....	3.25	3.25	.....
1/2	Gal #3 Wall paint.....	1.75	1.75	.....
2	Gal #11 Wall paint.....	3.25	6.50	.....
1/2	Gal #11 Wall paint.....	1.75	1.75	.....
	10% Disc. on 13.25.....		1.32	.....
17	Tanks drinking water May, 1927....	4.00	68.00	.....
200#	White lead.....	19.80 cwt	39.60	.....
1	Gal Varnish.....	4.50	4.50	.....
5	Sax Fire clay.....	1.35	6.75	.....
3	2x2-14 Fir lbr. 14 ft.....	.12	1.68	.....
100	Ft. 1/4 round.....	1.25	1.25	.....
1	2/8 x 6/8-1 1/8 screen door.....	5.50	5.50	.....
4	Boxes tacks.....	.10	.40	.....
3	Boxes brads.....	.10	.30	.....
	10% Disc. on 9.13.....		.91	.....
100#	White lead.....	.25	25.00	.....
1	Gal varnish.....	5.00	5.00	.....
2#	Burnt umber.....	.55	1.10	.....
	10% Disc. on 31.10.....		3.11	.....
8	Pkgs. Albastine.....	.75	6.00	.....
160#	Plaster.....	27.00 ton	2.16	.....
	10% Disc. on 8.16.....		.82	.....
2	Pts. Black enamel.....	1.39 1/2	2.79	.....
1	24x28 D S Glass.....	2.55	2.55	.....
1/2	Pt. Duco paint.....	.75	.75	.....
2	Sheets sand paper.....	.02 1/2	.05	.....
	10% Disc. on 3.35.....		.34	.....
20	2x4-14 Lumber 187'.....	41.00 M	7.67	.....
8	2x4-20 Lumber 107'.....	45.00 M	4.82	.....
4	2x12-14 Lumber 112'.....	42.00 M	4.70	.....
45	1x10-14 shiplap 525'.....	41.00 M	21.53	.....
15	1x6-16 #3 Boards 120'.....	41.00 M	4.92	.....
600	Fire brick.....	.12 1/2	75.00	.....
5	Gal linseed oil.....	2.20	11.00	.....
3	Gal. turpentine.....	2.20	6.60	.....
20#	Smooth wire.....	.10	2.00	.....
	10% Disc. on 138.24.....		13.82	.....
2	4" Paint brushes.....	3.50	7.00	.....
1	3 1/2" Paint brush.....	3.00	3.00	.....
1	Lettering brush.....	.25	.25	.....
1	Pt. paint solvent.....	.80	.80	.....
	10% Disc. on 11.05.....		1.11	.....
3	Pkgs. Alabastine.....	.75	2.25	.....
	10% Disc. on 2.25.....		.23	.....
5	Qts. #3 Wall Paint.....	.95	4.75	.....

		Gross	Your Int.
1"	Lamp black.....	.70	.....
	10% Disc. on 5.45.....	.55	.....
	Contract price for painting & building incinerator.....	110.00	.....
	Wash house.....	140.00	.....
	House #18.....	25.00	.....
	House #24.....	30.00	.....
	House #17.....	30.00	.....
	House #19.....	30.00	.....
	House #20.....	70.00	.....
	Water Supply, May, 1927.....	25.00	.....
	To Laundry on 4 blankets rtd. by Nason	1.25	.....
1/2	Day grading streets.....	4.25	2.12
4	Days pumping water.....	4.25	17.00
1	Day rep. plumbing & gas line.....	4.25	4.25
1	Day cleaning camp.....	4.00	4.00
15	Days caretaker.....	4.00	60.00
5	Hrs. hauling trash.....	1.50	7.50
4	Hrs. grading roads.....	3.50	14.00
12	Hrs. hauling trash.....	3.50	42.00
	Contract price to screen in porch on house #20.....	5.00	.....
	Painting Brownlee house.....	20.00	.....
	Contract price painting pump house	5.00	.....
	Painting & whitewashing 10 toilets	70.00	.....
	Shingling & rep. 10 toilets.....	60.00	.....
	Repairing & varnishing houses #3, 4, 24, 17		
	To water 15, 19, 20.....	72.00	.....
	sold during June, 1927.....	3.00	.....
1	2"x4" Nipple .....	.10	.10
1	2"RR Lip Union.....	.63	.63
	Gas supply for June, 1927.....	5.00	.....
2	Days cutting weeds.....	4.25	8.50
1/2	Day pumping water.....	4.25	2.12
2	Days cutting weeds.....	4.25	8.50
15	Days caretaker.....	4.00	60.00
9	Hrs. hauling trash.....	1.50	13.50
4	Hrs. dragging streets.....	6.00	.....
1	Mo. water supply June, 1927.....	25.00	.....
	To water sold during June, 1927....	5.00	.....
	To credit Exp. a/c/w/ labor & material chgd in May, 1927, in building incinerator trfrd to Investment a/c	75.40	.....
	Total	1,287.26	.....
	Your interest 6.9813%.....	.....	89.87

Detailed Statement of Camp Income—House Rent

Swayze Camp :	Gross	Your Int.
Misc. Sales House rent for June, 1927.....	10.00	.....
E. B. McCann House rent for June, 1927.....	10.00	.....
R. Armonette House rent for June, 1927.....	5.00	.....
T. A. Bellecourt House rent for June, 1927..	5.00	.....
Misc. Sales House rent for June, 1927, ded. from P.R.....	90.00	.....
Total	130.00	.....
Your interest 8.9813%.....	.....	8.38

Statement of Gas Sales :

Israel Sindon Farm	Gross	Your 45%
Gas Earnings: Sales: 26.00	.....	.....
Less 8½% royalty..... 1.95	24.05	10.83

	Gross	Your 22½%
Statement of Other Income: Oil Prod. Farms.		
Irving H. Baker Farm.		
Gas Earnings: Sales..... 8.00	.....	.....
Less 1/8 royalty..... 1.00	7.00	1.57
Steam Earnings.....	106.15	23.88
Water Earnings.....	5.00	1.13
House Rent.....	14.00	3.15
Total Other Income.....		29.73

[Endorsed]: Filed April 27, 1948. [78]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Plaintiffs and Defendant above named, in the above-entitled action, by and through the undersigned, their attorneys of record, that for all purposes in or connected with the above-entitled action, the following facts are admitted as being true and correct, to wit:

1. That the assignment, transfer, and conveyance to the Inland Empire Oil and Gas Syndicate of an undivided one-half interest of said Troy-Sweet Grass Oil Syndicate in the oil and gas leases and Operating Agreement, in so far as same pertained to the Southwest Quarter of Section 3 and the Southeast Quarter of Section 4, Township 35 North, Range 2 West, Montana Principal Meridian, commonly known as the Baker Lease, referred to in Paragraph VIII, page 5, of Plaintiffs' complaint was made on January 1, 1923.

2. That Mr. F. E. Hurley, Mr. A. M. Sellery, Mr. L. J. Yealy, Mr. Virgil McCracken, Mr. F. A. Billstone, Mr. F. B. Firmin, Mr. Slim Hungerford, and Mr. John McFadyen, who is also known under the names of John McFayden, Jack McFadyen, and Jack McFayden, respectively, were in the employ of the defendant The Ohio Oil Company, in the respective [80] capacities and during the respective years (amongst others) hereinafter set opposite their respective names, to wit:

Name	Capacity	Years Employed
F. E. Hurley	Vice President in charge of Rocky Mountain Division	May 1921 to May 1925
	Vice President in charge of Land and Property Acquisition	May 1925 until his death on July 27, 1928
A. M. Sellery	Leaseman, Rocky Mountain Division	1917-1927
L. J. Yealy	General Superintendent at Shelby, Montana	September 1922 to March 1938
Virgil McCracken	Cashier at Shelby Office	January 1, 1923 to Dec. 9, 1936
F. A. Billstone	Assistant Treasurer	January 14, 1915, to May 24, 1934
	Treasurer and Director	May 24, 1934 to August 1, 1946 (Retired)
F. B. Firmin	Cashier, Rocky Mountain Division	December 1919 to 1927
	Assistant Treasurer	1927-1935 (Died in 1942)
Slim Hungerford	Tool Pusher	1920-1924
John McFadyen	Division Manager, Rocky Mountain Division	1912 to May 31, 1941 (Retired) (Died April 26, 1943)

Dated this 28th day of October, 1949.

/s/ E. J. McCABE,
Attorney for Plaintiffs.

/s/ W. H. EVERETT,

/s/ LOUIS P. DONOVAN,
Attorneys for Defendant.

[Endorsed]: Filed November 7, 1949. [81]

[Title of District Court and Cause.]

STIPULATION OF FACTS ADMITTED

It Is Hereby Stipulated and Agreed by and between the Plaintiffs and Defendant above named, in the above-entitled action, by and through the undersigned, their attorneys of record, that for all purposes in or connected with the above-entitled action, the following facts alleged in the specified paragraphs of the answer of Defendant, heretofore filed in said action, are admitted by the Plaintiffs as being true and correct, to wit:

1. "That the Assignment therein referred to is not dated, but is acknowledged as of January 1, 1923, and that Inland Empire Oil and Gas Syndicate purchased its interest 'as subject to the interest of The Ohio Oil Company,' and that said Assignment specifically refers to the Operating Agreement attached to plaintiffs' Complaint" as alleged in Paragraph IV, page 2, of Answer.

2. "That in the Assignment therein referred to dated August 18, 1923, Potlatch Oil and Refining Company 'agrees to keep and perform the terms and conditions of all contracts and agreements of every kind and description by this instrument or otherwise this day transferred to' Potlatch Oil and Refining Company" as alleged in Paragraph V, page 2, of Answer.

3. "For the purpose of adjusting and setting said protests and reaching an agreement thereon, a conference was had [83] between representatives of

plaintiffs herein and representatives of defendant herein at Shelby, Montana, on or about August 7, 1925, and as a result of said conference, it was agreed between plaintiffs herein and the defendant herein that Messrs. Freeman, Thelen and Frary, attorneys at law at Great Falls, Montana, and attorneys for plaintiffs herein, would reduce to writing and send to defendant herein a statement of the items constituting the difference of opinion between plaintiffs and the defendant in the interpretation of said Operating Agreement and plaintiffs' objections to accounts theretofore rendered by the defendant in connection with its operations under the said Operating Agreement, and pursuant thereto the said Messrs. Freeman, Thelen and Frary, attorneys and agents for the plaintiffs herein, did reduce to writing and send to the defendant, on or about the 8th day of August, 1925, a written statement of the items in dispute, and thereafter on September 12, 1925, the defendant, through its Cashier, F. B. Firmin, replied to said Messrs. Freeman, Thelen & Frary" and "A full true and correct copy of said written statement from Messrs. Freeman, Thelen & Frary addressed to defendant under date August 8, 1925, is hereto attached and marked Exhibit 'A' hereof, and a full, true and correct copy of defendant's reply thereto under date September 12, 1925, is hereto attached and marked Exhibit 'B' hereof." (See paragraph IX, page 3, of Answer.)

4. That during the entire period of time between August 7, 1925, and February 28, 1943, written statements were rendered monthly by defendant to the

plaintiffs showing the costs and expenses as claimed by defendant in the developing and operating of the lands and leases under said Operating Agreement and for those months wherein said statements showed a credit balance remittances were made to the plaintiffs herein of the amounts shown as credits to plaintiffs on said statements, respectively, and that said statements were received and said remittances were accepted by the plaintiffs and [84] said remittances are still retained by plaintiffs, respectively. (See Paragraph IX, page 4, of Answer.)

5. "That the plaintiffs herein had notice of all the accounts of the defendant set forth in the complaint" and "that F. E. Hurley and A. M. Sellery died prior to the commencement of this action, said F. E. Hurley, defendant's Vice President, having died at Findlay, Ohio, on or about the 27th day of July, 1928, and the said A. M. Sellery having died at El Paso, Texas, on or about the 14th day of February, 1927." (See "First Affirmative Defense," page 5, of Answer.)

6. "That on or about July 5, 1922, the defendant, The Ohio Oil Company, commenced the drilling of a well upon the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 35 North, Range 2 West (the Israel Sindon Oil and Gas Lease), known as the I. Sindon No. 1 well, and completed the same to the formation known as the Sunburst sand, on or about the 18th day of September, 1922, to such depth as was deemed an adequate test of the oil and gas content of the first commercial oil sand, of said lease, and defendant obtained

therein a commercial gas well; and that the defendant, The Ohio Oil Company, commenced the drilling of a well upon the Irving H. Baker Oil and Gas Lease, known as Irving Baker No. 1 well, located on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, Township 35 North, Range 2 West, and defendant completed same to the formation known as the Ellis sand as a commercial oil well on or about the 27th day of January, 1923, and that at all times since the completion of said Irving Baker No. 1 well, the said Irving H. Baker lease has been developed and produced by The Ohio Oil Company and has produced oil in commercial quantities." (See Paragraph I, page 6, of Answer.)

7. That the defendant ever since the completion of the I. Sindon No. 1 well above mentioned and the Irving Baker No. 1 well above mentioned, has rendered to the plaintiffs herein monthly statements showing the cost and expenses as claimed by the [85] defendant of developing and operating said lands and leases and defendant has remitted to plaintiffs the amount of the credit shown on said monthly statements wherein said statements showed a credit balance. See paragraph III, pages 6 and 7, of Answer.)

8. That payments made by the Ohio Oil Company drawn to the order of plaintiffs, respectively, were transmitted to and received by plaintiffs and the statements and the checks were accepted and received by plaintiffs and said checks were presented for payment by plaintiffs and the amounts thereof were received by plaintiffs and plaintiffs, respec-

tively, have kept and retained the proceeds of said checks. (See paragraph IV, pages 7 and 8, of Answer.)

9. A correct copy of the monthly statement rendered by defendant to the plaintiff Potlatch Oil and Refining Company for the month of June, 1927, is attached to the defendant's answer marked Exhibit "C" thereof and a similar statement was made and rendered for the same month by defendant to Inland Empire Oil & Gas Syndicate. (See paragraph V, pages 8 and 9, of Answer.)

10. That the total amount of payments remitted to plaintiffs by the defendant from the date of the completion of the first commercial oil or gas well and the 31st day of January, 1943, amounted to approximately \$250,000. (See paragraph V, page 9, of Answer.)

Dated this 27th day of August, 1949.

E. J. McCABE,

Attorney for Plaintiffs.

LOUIS P. DONOVAN,

W. H. EVERETT,

Attorneys for Defendant.

[Endorsed]: Filed August 29, 1949. [86]

[Title of District Court and Cause.]

INTERROGATORIES TO ADVERSE PARTY

The defendant requests that the plaintiff, Potlatch Oil and Refining Company, by an officer or officers thereof, competent to testify in its behalf, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following Interrogatories:

1. Please state whether The Ohio Oil Company has furnished you with any statements of account under the Operating Agreement of June 15, 1922, attached to your Complaint herein.

2. When did The Ohio Oil Company furnish you the first such statement of account?

3. When did The Ohio Oil Company furnish you the last such statement of account?

4. Did The Ohio Oil Company furnish you a statement each and every month from and after the date of the first statement received by you? [88]

5. Do any of such statements show credit balances?

6. If you have answered "Yes" to Interrogatory 5, then please state what and all months credit balances are shown, listing the respective amounts thereof by date.

7. If you have answered Interrogatory 6 and have listed credit balances, then state whether checks of The Ohio Oil Company, for the respective credit

balances, were currently received by you with each such statement?

8. If you have answered Interrogatory 7 "Yes," then state whether you have received the amounts respectively represented by said checks so received.

9. If you have answered that you have received checks from The Ohio Oil Company, then state the approximate date each check was received by you and the amount thereof.

10. If you have answered that you have received monthly statements from The Ohio Oil Company, then properly identify and attach each and all and every part of such statements so received to your answer, and state that you have done so.

Dated this 28th day of April, A.D. 1948.

W. H. EVERETT,
Attorney for defendant, The Ohio Oil Company.

LOUIS P. DONOVAN,
Attorney for Defendant, The Ohio Oil Company.

[Endorsed]: Filed May 1, 1948. [89]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO
DEFENDANT'S INTERROGATORIES

Now Comes plaintiff Potlatch Oil and Refining Company and objects to Defendant's interrogatory number 10 of the interrogatories heretofore served upon said plaintiff, for the following reasons:

I.

That said interrogatory number 10 of said defendant is not for the discovery of facts and documents material to the support of defendant's or plaintiffs' cause within the meaning of Rule 33 of Federal Rules of Civil Procedure, in that said rule does not provide for the production of documents and writings. Rule 34 of Federal Rules of Civil Procedure provides for the production and inspection and copying or photographing of any designated document, paper, books, accounts, letters, photographs, objects, or tangible things not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in the possession, custody, or control of a party to the action.

Said plaintiff hereby consents to the inspection of the monthly statements referred to in said interrogatory number 10 and the copying or photographing by said defendant of any one or more or all of said monthly statements. Said statements are now in the custody of the attorney for said plaintiff, in his office 400-402 Montana Power [91] Building

(also known as the Electric Building) in the City of Great Falls, Cascade County, Montana.

Wherefore said plaintiff prays that the foregoing objection to said interrogatory number 10 of defendant be sustained and that plaintiff be relieved from compliance with said interrogatory.

Dated this 4th day of May, 1948.

/s/ E. J. McCABE,
Attorney for Plaintiff Potlatch Oil and Refining
Company.

[Endorsed]: Filed May 4, 1948. [92]

[Title of District Court and Cause.]

**NOTICE OF FILING OF PLAINTIFF'S OB-
JECTIONS TO DEFENDANT'S INTER-
ROGATORIES**

To the above-named Defendant to Messrs. W. H. Everett and Louis P. Donovan, attorneys for said defendant:

Please take notice that plaintiff will today file objections to defendant's interrogatories, heretofore served and filed in the above-entitled action, a copy of which is attached, and will bring on said objections for hearing thereof by the court on the 14th

day of May, 1948, at 10 o'clock a.m., or as soon thereafter as counsel can be heard.

Dated this 4th day of May, 1948.

E. J. McCABE,
Attorney for Plaintiff, Potlatch Oil and Refining
Company.

[Endorsed]: Filed May 4, 1948. [93]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Montana,
County of Cascade—ss.

E. J. McCabe, being first duly sworn, deposes and says:

That he is the attorney of record for the plaintiffs named in the above-entitled action, and resides and maintains his office at Great Falls, Montana;

That Mr. Louis P. Donovan is one of the attorneys for the defendant named in the above-entitled action and resides and maintains his office at Shelby, Montana; and that Mr. W. H. Everett is the other attorney for the defendant in the above action and resides and maintains his office in Casper, Wyoming; his office address being Ohio Oil Company Building, Casper, Wyoming;

That on the 4th day of May, 1948, affiant enclosed a true and correct copy of the annexed notice of filing plaintiff's objections to defendant's inter-

rogatories, together with a copy of said objections, in a securely sealed envelope addressed to Mr. Louis P. Donovan, Attorney at Law, Shelby, Montana, and deposited said envelope, with postage thereon fully prepaid, in the United States Post Office at Great Falls, Montana, for transmission and delivery to said attorney in regular course of mail.

That on the 4th day of May, 1948, affiant enclosed a true [94] and correct copy of the annexed notice of filing plaintiff's objections to defendant's interrogatories, together with a copy of said objections, in a securely sealed envelope addressed to Mr. W. H. Everett, Attorney at Law, Ohio Oil Company Building, Casper, Wyoming, and deposited said envelope, with postage thereon fully prepaid, in the United States Post Office at Great Falls, Montana, for transmission and delivery to said attorney in regular course of mail.

That there is regular and daily communication by United States mail between Great Falls, Montana, and Shelby, Montana, and between Great Falls, Montana, and Casper, Wyoming.

E. J. McCABE.

Subscribed and sworn to before me this 4th day of May, 1948.

[Seal] F. R. DECKER,
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires Sept. 13, 1950.

[Title of District Court and Cause.]

ANSWERS OF PLAINTIFF POTLATCH OIL
AND REFINING COMPANY TO INTER-
ROGATORIES

Answering the interrogatories propounded by the Defendant, The Ohio Oil Company, the Potlatch Oil and Refining Company makes answer and states as follows:

Defendant's Interrogatory Number 1.

Answer: Yes.

Défendant's Interrogatory Number 2.

Answer: About October 10, 1923.

Defendant's Interrogatory Number 3.

Answer: About February 20, 1943.

Defendant's Interrogatory Number 4.

Answer: Yes.

Defendant's Interrogatory Number 5.

Answer: Yes.

Defendant's Interrogatory Number 6.

Answer:

May 31, 1924.....	\$ 2,721.29
June 30, 1924.....	4,043.13
July 31, 1924.....	2,545.83
August 30, 1924.....	1,526.04
September 30, 1924.....	3,569.29
October 31, 1924.....	2,556.61
November 29, 1924.....	974.48
December 31, 1924.....	1,597.08

January 31, 1925.....	\$ 1,450.48
February 28, 1925.....	2,182.96
March 31, 1925.....	3,290.59
April 30, 1925.....	1,478.55
May 31, 1925.....	2,197.19
June 30, 1925.....	530.40
July 31, 1925.....	5,300.62
August 31, 1925.....	1,261.07
September 30, 1925.....	1,430.45
October 31, 1925.....	No Credit Balance
Shown on Statement	
November 30, 1925.....	2,121.03
December 31, 1925.....	1,083.43
January 31, 1926.....	1,871.65
February 27, 1926.....	1,217.52
March 31, 1926.....	2,659.57
April 30, 1926.....	1,761.26
May 31, 1926.....	2,181.02
June 30, 1926.....	2,161.79
July 31, 1926.....	736.73
August 31, 1926.....	361.58
September 30, 1926.....	2,363.00
October 31, 1926.....	1,989.60
November 30, 1926.....	2,388.95
December 31, 1926.....	No Credit Balance
Shown on Statement	
January 31, 1927.....	1,777.97
February 28, 1927.....	2,339.78
March 31, 1927.....	2,719.44
April 30, 1927.....	1,947.25
May 31, 1927.....	2,602.92
June 30, 1927.....	2,496.25

July 30, 1927.....	\$ 3,158.74
August 31, 1927.....	No Credit Balance
	Shown on Statement
September 30, 1927.....	1,147.93
October 31, 1927.....	366.43
November 30, 1927.....	1,350.10
December 31, 1927.....	1,754.74
January 31, 1928.....	No Credit Balance
	Shown on Statement
February 29, 1928.....	1,323.10
March 31, 1928.....	799.86
April 30, 1928.....	1,062.04
May 31, 1928.....	594.51
June 30, 1928.....	No Credit Balance
	Shown on Statement
July 31, 1928.....	1,217.40
August 31, 1928.....	2,162.06
September 29, 1928.....	2,109.89
October 31, 1928.....	2,220.57
November 30, 1928.....	1,240.52
December 31, 1928.....	2,036.68
January 31, 1929.....	1,831.29
February 28, 1929.....	2,120.68
March 30, 1929.....	1,818.61
April 30, 1929.....	2,126.97
May 31, 1929.....	1,946.37
June 29, 1929.....	1,671.05
July 31, 1929.....	1,904.75
August 31, 1929.....	1,937.24
September 30, 1929.....	2,500.58
October 31, 1929.....	984.93
November 30, 1929.....	No Credit Balance
	Shown on Statement

December 31, 1929.....	\$ 1,556.47
January 31, 1930.....	1,763.90
February 28, 1930.....	1,961.31
March 31, 1930.....	1,859.74
April 30, 1930.....	2,063.33
May 31, 1930.....	2,090.54
June 30, 1930.....	1,681.59
July 31, 1930.....	2,059.40
August 30, 1930.....	2,053.48
September 30, 1930.....	940.27
October 31, 1930.....	837.00
November 29, 1930.....	166.34
December 31, 1930.....	777.02
January 31, 1931.....	478.88
February 28, 1931.....	596.13
March 31, 1931.....	455.88
April 30, 1931.....	647.05
May 29, 1931.....	725.25
June 30, 1931.....	471.12
July 31, 1931.....	504.49
August 31, 1931.....	835.56
September 30, 1931.....	955.39
October 31, 1931.....	665.25
November 30, 1931.....	83.38
December 31, 1931.....	921.62
January 30, 1932.....	1,112.68
February 29, 1932.....	1,060.92
March 31, 1932.....	783.35
April 30, 1932.....	1,120.47
May 31, 1932.....	1,366.41
June 30, 1932.....	1,168.18
July 30, 1932.....	1,178.90

August 31, 1932.....	\$ 1,275.59
September 30, 1932.....	807.36
October 31, 1932.....	863.11
November 30, 1932.....	222.74
December 31, 1932.....	630.76
January 31, 1933.....	560.10
February 28, 1933.....	466.51
March 31, 1933.....	715.30
April 29, 1933.....	666.99
May 31, 1933.....	629.53
June 30, 1933.....	737.65
July 31, 1933.....	805.94
August 31, 1933.....	108.82
September 30, 1933.....	856.00
October 31, 1933.....	1,052.52
November 29, 1933.....	978.80
December 31, 1933.....	886.36
January 31, 1934.....	1,221.42
February 28, 1934.....	1,001.41
March 31, 1934.....	609.03
April 30, 1934.....	814.73
May 31, 1934.....	1,037.51
June 30, 1934.....	1,298.17
July 31, 1934.....	422.91
August 31, 1934.....	1,271.65
September 29, 1934.....	693.36
October 31, 1934.....	558.94
November 30, 1934.....	672.40
December 31, 1934.....	397.41
January 31, 1935.....	550.92
February 28, 1935.....	319.60
March 30, 1935.....	225.86

April 30, 1935.....	\$ 318.76
May 31, 1935.....	483.70
June 30, 1935.....	569.28
July 31, 1935.....	493.88
August 31, 1935.....	252.48
September 30, 1935.....	No Credit Balance
	Shown on Statement
October 31, 1935.....	No Credit Balance
	Shown on Statement
November 31, 1935.....	No Credit Balance
	Shown on Statement
December 31, 1935.....	No Credit Balance
	Shown on Statement
January 31, 1936.....	No Credit Balance
	Shown on Statement
February 29, 1936.....	71.62
March 31, 1936.....	779.07
April 30, 1936.....	696.85
May 31, 1936.....	433.28
June 30, 1936.....	620.64
July 31, 1936.....	557.62
August 31, 1936.....	616.95
September 30, 1936.....	398.57
October 31, 1936.....	334.99
November 30, 1936.....	No Credit Balance
	Shown on Statement
December 31, 1936.....	295.12
January 31, 1937.....	505.68
February 28, 1937.....	331.10
March 31, 1937.....	707.62
April 30, 1937.....	465.94
May 31, 1937.....	570.44

June 30, 1937.....	\$ 590.35
July 31, 1937.....	274.24
August 31, 1937.....	556.77
September 30, 1937.....	493.86
October 31, 1937.....	329.12
November 30, 1937.....	No Credit Balance
Shown on Statement	
December 31, 1937.....	14.65
January 31, 1938.....	42.66
February 28, 1938.....	162.23
March 31, 1938.....	106.74
April 30, 1938.....	126.66
May 31, 1938.....	131.74
June 30, 1938.....	127.62
July 31, 1938.....	156.71
August 31, 1938.....	134.98
September 30, 1938.....	104.81
October 31, 1938.....	No Credit Balance
Shown on Statement	
November 30, 1938.....	No Credit Balance
Shown on Statement	
December 31, 1938.....	No Credit Balance
Shown on Statement	
January 31, 1939.....	No Credit Balance
Shown on Statement	
February 28, 1939.....	No Credit Balance
Shown on Statement	
March 31, 1939.....	77.52
April 30, 1939.....	162.38
May 31, 1939.....	232.23
June 30, 1939.....	224.15
July 31, 1939.....	342.24

August 31, 1939.....	\$ 210.83
September 30, 1939.....	156.61
October 31, 1939.....	238.99
November 30, 1939.....	51.58
December 31, 1939.....	198.79
January 31, 1940.....	208.70
February 29, 1940.....	205.24
March 31, 1940.....	103.06
April 30, 1940.....	216.26
May 31, 1940.....	551.40
June 30, 1940.....	No Credit Balance Shown on Statement
July 31, 1940.....	No Credit Balance Shown on Statement
August 31, 1940.....	No Credit Balance Shown on Statement
September 30, 1940.....	No Credit Balance Shown on Statement
October 31, 1940.....	90.28
November 30, 1940.....	88.04
December 31, 1940.....	251.89
January 31, 1941.....	309.17
February 28, 1941.....	322.37
March 31, 1941.....	114.94
April 30, 1941.....	175.76
May 31, 1941.....	169.03
June 30, 1941.....	254.98
July 31, 1941.....	139.29
August 30, 1941.....	255.91
September 30, 1941.....	321.82
October 30, 1941.....	209.60
November 30, 1941.....	48.89

December 31, 1941.....	\$ 286.36
January 31, 1942.....	267.03
February 28, 1942.....	293.08
March 31, 1942.....	361.09
April 30, 1942.....	238.73
May 31, 1942.....	156.71
June 30, 1942.....	483.44
July 31, 1942.....	488.90
August 31, 1942.....	530.52
September 30, 1942.....	426.15
October 31, 1942.....	58.18
November 30, 1942.....	179.19
December 31, 1942.....	262.11
January 31, 1943.....	331.01

The above noted monthly credit balances sometimes included amounts for gas from the Israel Sinton Oil and Gas Lease.

Defendant's Interrogatory Number 7.

Answer: Yes, except that in the months hereinafter specified, amounts less than the credit balances shown were paid, as hereinafter specified in Plaintiff's answer to Defendant's Interrogatory Number 9.

Defendant's Interrogatory Number 8.

Answer: Yes, the amounts shown on the checks were received.

Defendant's Interrogatory Number 9.

Answer: Checks were received at dates varying approximately from twenty to thirty days following the dates of the respective statements,

in the amounts of the respective stated credit balances, with the following exceptions, to wit:

(a) May 31, 1924, credit balance shown on statement was \$2,721.29, amount of check received \$2,221.29;

(b) June 30, 1924, credit balance shown on statement was \$4,043.13, amount of check received \$3,543.13;

(c) July 31, 1924, credit balance shown on statement was \$2,545.83, amount of check received \$2,045.83.

It is impossible to give the exact dates shown on the checks received as same were cashed by Plaintiff and such checks were returned to the Defendant, who must have same among its files and records.

Defendant's Interrogatory Number 10.

Answer: Objections to Defendant's Interrogatory Number 10 have been filed and served and notice of time of intended presentation of such objections to the Court has been heretofore given to Defendant.

Dated this 22nd day of May, A.D. 1948.

POTLATCH OIL AND
REFINING COMPANY,

By JEAN P. GERLOUGH,
Manager and Secretary. [105]

State of Montana,
County of Cascade—ss.

Jean P. Gerlough, being first duly sworn, deposes and says:

That he is the manager and secretary of the Potlatch Oil and Refining Company, a corporation, one of the above-named Plaintiffs, and that he has been connected with said corporation in various official capacities of Director and Secretary-Treasurer from time to time since the organization of said corporation, and has personal knowledge of most of the matters inquired about and above answered.

That all of the above answers subscribed by him are true to the best of his knowledge, information, and belief; that as to all matters therein not within his personal knowledge he has made diligent inquiry and answered upon information that he verily believes to be true.

JEAN P. GERLOUGH.

Subscribed and sworn to before me this 22nd day of May, 1948.

[Seal]

E. McCABE.

Notary Public for the State of
Montana.

My commission expires July 25, 1948.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 24, 1948. [106]

[Title of District Court and Cause.]

ADDITIONAL FACTS ALLEGED IN THE
ANSWER OF THE DEFENDANT AND
ADMITTED BY THE PLAINTIFFS FOR
TRIAL PURPOSES

Supplementing the interrogatories submitted and answered by the respective parties and filed in the above-entitled action, and supplementing stipulations of fact by the above-named parties and filed in said action, the following facts, alleged in the answer of the above-named defendant in said action, are admitted by the plaintiffs without the defendant being required to prove such alleged facts in the trial of the above action. References are to paragraph and page where the alleged facts appear in defendant's Answer.

1. That the assignment referred to in Paragraph VIII of the plaintiff's Complaint is not dated, but is acknowledged as of January 1, 1923, and that Inland Empire Oil and Gas Syndicate purchased its interest "as subject to the interest of the Ohio Oil Company" and that said assignments specifically refer to the Operating Agreement attached to plaintiff's Complaint. (Paragraph IV, page 2.)

2. That in the assignment dated August 18, 1923, and referred to in Paragraph IX of the Complaint, Potlatch Oil and Refining Company "agrees to keep and perform the terms and conditions of all contracts and agreements of every kind and [109] description by this instrument or otherwise this

day transferred to" Potlatch Oil and Refining Company. (Paragraph V, page 2.)

3. Prior to August 1, 1925, the plaintiffs herein made certain protests and objections to certain of the charges contained in monthly statements rendered by defendant herein to plaintiffs showing its expenses and other results of its operation under the terms of said Operating Agreement and for the purpose of adjusting and settling said protests and reaching an agreement thereon, a conference was had between representatives of plaintiffs herein and representatives of the defendant herein at Shelby, Montana, on or about August 7, 1925, and as a result of said conference, it was agreed between plaintiffs herein and the defendant herein that Messrs. Freeman, Thelen and Frary, attorneys at law at Great Falls, Montana, and attorneys for plaintiffs herein, would reduce to writing and send to defendant herein a statement of the items constituting the difference of opinion between plaintiffs and the defendant in the interpretation of said Operating Agreement and plaintiffs' objections to accounts theretofore rendered by the defendant in connection with its operations under the said Operating Agreement, and pursuant thereto the said Messrs. Freeman, Thelen and Frary, attorneys and agents for the plaintiffs herein, did reduce to writing and send to the defendant, on or about the 8th day of August, 1925, a written statement of the items in dispute, and thereafter on September 12, 1925, the defendant, through its Cashier, F. B. Firmin, replied to said Messrs. Freeman, Thelen &

Frary that a full, true, and correct copy of said written statement from Messrs. Freeman, Thelen & Frary addressed to defendant under date of August 8, 1925, is marked Exhibit "A" and is attached to said answer, and a full, true, and correct copy of defendant's [110] reply thereto under date of September 12, 1925, is marked Exhibit "B" and attached to said answer; and that during the entire period of time between the 7th day of August, 1925, and the 8th day of July and the 15th day of February, 1943, written statements were rendered monthly by defendant to plaintiffs showing the claimed actual cost and expense of defendant in developing and operating the lands and leases described in the Operating Agreement between Troy-Sweet Grass Oil Syndicate and the defendant, dated June 15, 1922, and for those months wherein said statements showed a credit balance, remittance of the amount of such credit balance was made to plaintiffs, respectively, and that said remittances are still retained by plaintiffs and each of them. (Paragraph IX, pages 3 and 4.)

4. That plaintiffs had notice of all of the facts and also the accounts of the defendant as set forth in the Complaint and refrained from commencing this action until March 18, 1947, and that defendant's representatives, F. E. Hurley and A. M. Sellery, who negotiated the Operating Agreement and assignment of leases, copies of which are attached to plaintiffs' Complaint herein and marked Exhibits "A" and "B," died prior to the commencement of this action; the said F. E. Hurley,

defendant's vice-president, died at Findlay, Ohio, on or about July 27, 1928, and A. M. Sellery died at El Paso, Texas, on or about the 14th day of February, 1927, but that plaintiffs did not have knowledge of the deaths of said persons until on or about the year 1947. ("First Affirmative Defense," page 5.)

5. That defendant on or about July 5, 1922, commenced drilling of a well upon the Israel Sindon oil and gas lease (SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 35 North, Range 2 West) known as the I. Sindon No. 1 well and completed same to the Sunburst sand on or about September 18, 1922, in a diligent [111] and workmanlike manner to such depth as was deemed an adequate test of the oil and gas content of the first commercial oil sand, in compliance with the terms and conditions of aforesaid oil and gas leases and that defendants obtained therein a commercial gas well; and that on or about the 15th day of October, 1922, the defendant commenced the actual drilling of a well upon the Irving H. Baker oil and gas lease, known as Irving Baker No. 1 Well located on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, Township 35 North, Range 2 West, and completed same to the formation known as the Ellis sand as a commercial oil well on or about the 27th day of January, 1923, and at all times since the completion of said well to, and including January 31, 1943, the Irving H. Baker lease has been developed and produced by the Ohio Oil Company and has produced oil in commercial quantities, but that the

work of acquiring and moving of necessary equipment and materials to the land embraced in said Irving H. Baker lease to drill same was commenced on or about June 17, 1922, and extended thereafter at various times to the date of commencement of actual drilling of the aforesaid well upon said lease on October 15, 1922. (Paragraph I, page 6.)

6. That ever since the completion of the I. Sindon No. 1 well, above mentioned, and the Irving Baker No. 1 well, above mentioned, and from the dates upon which the plaintiffs, respectively, acquired their respective interests in and under the aforesaid Operating Agreement, the defendants rendered monthly statements to plaintiffs showing the claimed actual costs and claimed expenses of defendants of developing and operating said lands and leases, and that defendant has remitted to plaintiffs for those months wherein said statements showed a credit balance alleged in said monthly statements, respectively, and that plaintiffs at all said times had had the right of access to the buildings, lands, and property mentioned in said Operating Agreement for the purpose of examining [112] the operations thereunder and the production therefrom and the further right at all reasonable times during the business hours to examine books and records of the defendant insofar as they pertained to the operations conducted under said Operating Agreement, except that such books and records of defendant were not kept within the state of Montana and were kept in part at Casper, Wyoming,

and in part at Findlay, Ohio. (Paragraph III, page 7.)

7. That during the time subsequent to the completion of the first commercial oil or gas well upon the premises described in said Operating Agreement, and from the time when the plaintiffs respectively acquired their interest and rights in and under said Operating Agreement, and during and up to the 31st day of January, 1943, the defendant made monthly statements in writing to the plaintiffs herein purporting upon the face of each of said monthly statements to state the total amount of monthly oil production from the lands described in said Operating Agreement and at the purported price at which the same was sold or accounted for and the claimed actual cost and claimed expense of defendant of developing and operating said lands and leases, and for those months wherein the statements showed a credit balance, remittances of the amounts of the stated credit balance were made by defendant to plaintiffs by check of the defendant, drawn to the order of plaintiffs herein, respectively, and were subsequently transmitted and received by the plaintiffs, respectively, and that the said checks were presented for payment by the plaintiffs and the various amounts thereof were received by the plaintiffs and the plaintiffs have ever since kept and retained the proceeds of said checks and that the amounts of aforesaid credit balances and the amounts of aforesaid checks purported to be plaintiffs' respective share [113] of the production from the leased lands less the purported deductions made

by the defendant as plaintiffs' proportionate share of purported costs, expenses, and charges. (Paragraph IV, pages 7 and 8.)

8. That a correct copy of the monthly statement rendered by defendant herein to the plaintiff, Potlatch Oil and Refining Company, for the month of June, 1927, and purporting to show the cost, expense, and charges of the developing and operating of certain properties described in the Operating Agreement and the purported receipt of oil and gas produced therefrom is marked Exhibit "C" to the said answer of the defendant herein and similar statement was made and rendered for the same month by the defendant to Inland Empire Oil and Gas Syndicate, and that similar monthly statements in substantially the same form as to subject matter and differing from Exhibit "C" hereto attached only as to the month in question and the amounts of oil or gas produced and sold and amount of payments received from same and costs and expenses of development and operation, were rendered and delivered to plaintiffs during each of the months between the dates upon which the plaintiffs acquired their respective interests in the aforesaid Operating Agreement and the leases described therein to, and including, the 31st day of January, 1943, and such statements upon their face purported to show the claimed actual costs, charges, and expenses of defendant in operating said lands and leases and purported to show the claimed proceeds of the defendant from the sale of oil or gas pro-

duced or sold from said premises and the shares claimed by defendant as purported to be the share of the respective plaintiffs therein and for those months where said statements showed a credit balance, each of said statements was accompanied by a check, purporting [114] to remit to each of the plaintiffs herein the amount of such proceeds payable to each plaintiff at the date of such monthly statements, and the said monthly payments were accepted and retained by plaintiffs herein and that the total amount of such payments remitted to plaintiffs and to the predecessors in interest of plaintiffs, respectively, by the defendant between the date of the completion of the first commercial oil or gas well under the terms of said Operating Agreement and the 31st day of January, 1943, equalled or exceeded the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00). (Paragraph V, pages 8 and 9.)

Dated this 30th day of November, 1949.

/s/ E. J. McCABE,
Attorney for Plaintiffs.

[Endorsed]: Filed December 14, 1949. [115]

[Title of District Court and Cause.]

ORDER

The Court, in furtherance of convenience of the parties and the Court, will order a trial of the claims of the respective parties, hereinafter specified; and the Court, being fully advised in the premises, and It Appearing to the Court that the convenience of the Court and parties to this action would be furthered by the granting of said request and ordering a trial upon the issues and claims hereinafter specified;

Now, Therefore, pursuant to the provisions of Rule 42 (b) of the Rules of Civil Procedure, It Is Ordered that the following issues be tried prior to any accounting that may be taken in this case, if an accounting is found necessary. Said issues and claims are as follows:

(a) That the Court determine, as an issue, whether oral evidence of the character offered by the Deposition of T. P. Jones on file herein [117] or any similar oral testimony from other witnesses to such effect is admissible for the purpose of (a) modifying or explaining the terms of the Operating Agreement, a copy of which is attached to Plaintiffs' Complaint herein and marked Exhibit "A" thereof, or (b) interpreting the same and if the Court finds that such testimony is admissible, then that the Court further find what the actual agreement dated June 15, 1922, between Troy-Sweet Grass Oil Syndicate and The Ohio Oil Company was in regard to such matters, and that the Court

adjudge and declare the true and actual meaning of the said Operating Agreement made and entered into between Troy-Sweet Grass Oil Syndicate, as party of the first part, and The Ohio Oil Company, as party of the second part, dated June 15, 1922, a copy of which is attached to Plaintiff's Complaint herein and marked Exhibit "A" thereof; and what costs and expenses of developing and operating said lands for oil and gas purposes, as incurred by The Ohio Oil Company, could properly be charged in part (to the extent of 45% thereof) to Troy-Sweet Grass Oil Syndicate, and its successors in interest;

(b) That the Court determine, as an issue herein, the merits of the defendant's First Affirmative Defense set up in Defendant's [118] Answer herein, pleading the defense of laches as a bar to the cause of action set forth in Plaintiffs' Complaint;

(c) That the Court determine, as an issue herein, the merits of the Defendant's Second Affirmative Defense and defendant's Third Affirmative Defense set forth in its Answer herein, wherein defendant pleads the five-year statute of limitations in its Second Affirmative Defense and the eight-year statute of limitations in its Third Affirmative Defense;

(d) That the Court determine, as an issue herein, the merits of defendant's Fourth Affirmative Defense set forth in its Answer herein, wherein defendant pleads in effect that there was an account stated between the plaintiffs herein and the defend-

ant herein by their respective monthly statements;
and

(e) That a finding and decision be made by the Court on the foregoing issues before any trial is ordered upon the question of an accounting herein.

Done in Open Court this 22nd day of December,
A.D. 1949.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered December 22,
1949. [119]

[Title of District Court and Cause.]

MOTION

Comes Now the defendant, The Ohio Oil Company, a corporation, and at the close of all of the testimony in the above-entitled case upon the trial of issues preliminary to any accounting in the above-entitled action, respectfully moves the Court that the Court make its Findings of Fact and Conclusions of Law and enter a judgment in the above-entitled action in favor of the defendant and against the plaintiffs upon the following grounds and for the following reasons:

1. That the oral evidence offered by plaintiffs herein by the Deposition of T. P. Jones, and other evidence of similar character to the effect that it was orally agreed by the parties to the Operating Agreement between Troy-Sweet Grass Oil Syndi-

cate, as party of the first part, and The Ohio Oil Company, as party of the second part, dated June 15, 1922, at the time of or before the execution of said written agreement, that no part of the expenses for development or operation of the leases described in said agreement, would be charged to Troy-Sweet Grass Oil Syndicate, or its successors, where same were incurred off of the lease or for any overhead or supervision of operations in the development and production of the leases or even for pumping wells situated thereon, and that no cost of operations of wells after the well was drilled and put on production, was to be chargeable to Troy-Sweet Grass Oil Syndicate, or its successors, and that all oral testimony to the effect that it was the intention of the parties [121] to the Operating Agreement that The Ohio Oil Company should drill the wells and put them in production, and that Troy Sweet Grass Oil Syndicate would pay its 45% of such expenses, and from there on should pay nothing and be chargeable with nothing for operation of said leases, and all similar oral testimony from other witnesses to such effect is contrary to and inconsistent with the plain, certain and unambiguous terms of the written agreement, and that said proposed oral testimony is inadmissible for the purpose of modifying, varying or pretending to interpret said written contract, upon the ground and for the reason that the said written agreement between Troy-Sweet Grass Oil Syndicate, as first party, and The Ohio Oil Company, as second party, dated June 15, 1922, is not uncertain or ambiguous, and does not require

any interpretation, and said written agreement expressly declares that it (The Ohio Oil Company) will "pay all costs and expenses of developing and operating said lands for oil and gas purposes," as therein provided, and shall charge the said party of the first part (Troy-Sweet Grass Oil Syndicate) 45% thereof; and the above-mentioned oral testimony of T. P. Jones and other witnesses offering similar testimony is not an interpretation of any uncertain or ambiguous terms of the written contract, but on the contrary, is a direct contradiction of the plain and certain terms of said written contract, and upon that ground and for that reason the said oral testimony is inadmissible as an attempt to vary the terms of a written contract, and no force or effect should be given thereto.

2. That even if the Court should find that the oral testimony of T. P. Jones above mentioned or other similar oral testimony was admissible for the purpose of interpreting or modifying the written contract, or on any other ground, the weight of the testimony clearly shows that the written contract is a true and correct expression of the intention of the parties thereto, as indicated by the following evidence herein:

(a) The testimony of K. G. Luke, Secretary and a co-trustee of Troy-Sweet Grass Oil Syndicate, is inconsistent with and fully contradicts the testimony of said T. P. Jones in regard to the making of the said written contract and the negotiations leading up to the making of said contract [122] between Troy-Sweet Grass Oil Syndicate, first

party, and The Ohio Oil Company, second party, dated June 15, 1922; and

(b) The said testimony of T. P. Jones is further contradicted by the testimony of A. M. Gee, the only witness now surviving, who represented The Ohio Oil Company in said negotiations; and

(c) The interpretation placed upon said agreement by the parties thereto (Troy-Sweet Grass Oil Syndicate and The Ohio Company) for more than a year after the date thereof, as shown by the fact that monthly statements were rendered during said period of time by The Ohio Oil Company, as operator, and party of the second part, to said Troy-Sweet Grass Oil Syndicate, as first party and owner of a non-operating interest in said leases, in which monthly statements charges were regularly made by The Ohio Oil Company for overhead and for other charges off the leases and for costs of operating the lease subsequent to the date when wells were drilled and placed on production, without objection made by Troy-Sweet Grass Oil Syndicate, and therefore shows that the parties to the original agreement construed the said agreement in accordance with the plain and unambiguous terms thereof and without giving any force or effect to the alleged oral negotiations testified to by T. P. Jones in his Deposition offered herein leading up to the execution of said written agreement dated June 15, 1922; and also by the further fact that other similar operating agreements were entered into by Troy-Sweet Grass Oil Syndicate and Potlatch Oil and Refining Company, as lease-owners, and The Ohio

Oil Company, as operator, on or about the 15th day of June, 1922, affecting other lands in the Kevin-Sunburst Oil Field in Toole County, Montana, in which the language in regard to charges that might be legitimately made to the non-operating party interested, were the same as the provisions contained in the contract between Troy-Sweet Grass Oil Syndicate, as first party, and The Ohio Oil Company, as second party, dated June 15, 1922, and that in the interpretation of the said Operating Agreements by the parties thereto, the Troy-Sweet Grass Oil Syndicate did not make any objection to charges made by The Ohio Oil Company for water obtained from Sunhio system or other expenses incurred off the lease, including expenses incurred by The Ohio Oil Company in the construction and maintenance of the Ohio-Swayze Camp, and that the same [123] was also true of the agreement between Potlatch Oil and Refining Company, as first party, and The Ohio Oil Company, as second party, dated June 15, 1922, affecting the Oliver Hannon lease and the Baptiste-Sindon lease covering respectively the E $\frac{1}{2}$ W $\frac{1}{2}$ and W $\frac{1}{2}$ E $\frac{1}{2}$ of Section 26, Township 36 North, Range 2 West, and the S $\frac{1}{2}$ of Section 1, Township 35 North, Range 2 West, and thus indicates that the parties to the said basic agreement between Troy-Sweet Grass Oil Syndicate and The Ohio Oil Company placed their own interpretation upon said contract and interpreted same in accordance with the contention of the defendant, The Ohio Oil Company, in this action, and contrary to the claims and contentions of the plaintiffs herein.

(3) That the evidence offered herein on the part of the plaintiffs, if same be deemed admissible for any purpose, merely tends to show that if the plaintiffs had any right of action at any time in connection with said contract between Troy Sweet Grass Oil Syndicate, as first party, and The Ohio Oil Company, as second party, dated June 15, 1922, a copy of which is attached to Plaintiffs' Complaint herein, the same was in the nature of a right to have said contract reformed and made to express an agreement and intention of parties contrary to the express terms of said contract between the parties to said contract, dated June 15, 1922, and that the plaintiffs herein are now barred by laches and also by the statute of limitations of the State of Montana from making any claim to reform said contract, and all claims under said contract based upon the oral testimony offered by plaintiffs herein for the alleged purpose of interpreting said contract, but actually for the purpose of contradicting same and varying the terms thereof, should be and the same are barred by laches in view of the undisputed fact that all of the representatives of The Ohio Oil Company participating in the negotiations and execution of said contract and the interpretation of same (except A. M. Gee) are now deceased, including Defendant's Vice-President, F. E. Hurley, and Defendant's Lease Representative, A. M. Sellery, and Defendant's Cashier, F. B. Firmin, and Defendant's General Manager, John McFayden.

4. That none of the oral testimony offered by plaintiffs or any assignor of plaintiffs, including

T. P. Jones, as to the facts of direct transactions or oral communications between the proposed witness and the deceased [124] agents (F. E. Hurley, F. B. Firmin, John McFayden and A. M. Sellery) of The Ohio Oil Company, is admissible for the reason that such parties plaintiff, or assignors of parties plaintiff, cannot be witnesses under the statute of Montana in such cases made and provided, in that should it appear to the Court that no injustice will be done by excluding such proposed testimony.

5. That the evidence shows that under the terms of the Contract herein, if any error was made by defendant, The Ohio Oil Company, in the rendition of the monthly accounts, as required by the terms of said contract dated June 15, 1922, and there was any failure to make monthly payments or to account to Troy-Sweet Grass Oil Syndicate, or its successors, for the undivided 45% of the proceeds from the sale of production from said leases at the prevailing market price at the wells for said oil and gas, after deducting all royalty oil and gas or the proceeds thereof, such failure gave rise to a cause of action at date thereof upon which an action could be immediately brought by the aggrieved party against The Ohio Oil Company, if any valid grievance existed, and that all such causes of action arising more than eight years prior to the date of commencement of the present action on the 18th day of March, 1947, are barred by the Montana statute of limitations relating to actions based upon contracts in writing.

6. That the testimony offered by plaintiffs herein relating to the alleged statements or alleged promises of John McFadyn, or other agents of the defendant, The Ohio Oil Company, is incompetent and insufficient as being the testimony of persons who are assignors of the present plaintiffs herein and also upon the further ground that said testimony in regard to the said alleged promises does not, under the Montana statute of limitations in the State of Montana or the Montana rule of laches, operate to suspend or control the statute of limitations, in that the statute of limitations in the State of Montana can be tolled or suspended only in the manner prescribed by the statute of limitations and not in any other manner, and that none of the alleged statements of John McFayden or L. J. Yealy or Virgil McCracken, or any other agent of The Ohio Oil Company, operated to suspend or toll the statute of limitations or to extend the time within which an action should [125] have been commenced by the plaintiffs without being subject to the bar of laches or the statute of limitations.

7. That the evidence herein shows without dispute that during the entire period of the operation of said leases by The Ohio Oil Company from June 15, 1922, to January 31, 1943, The Ohio Oil Company rendered to the plaintiffs herein and their predecessor in interest, Troy-Sweet Grass Oil Syndicate, monthly statements as required by the terms of said Contract dated June 15, 1922, between Troy-Sweet Grass Oil Syndicate, as first party, and The Ohio Oil Company, as second party, and that in

all cases where, under the terms of said agreement, a credit and payment was due to the said Troy-Sweet Grass Oil Syndicate, or to the plaintiffs herein as the successors in interest of Troy-Sweet Grass Oil Syndicate, a check was made in remittance of such payment to such party, and that same was transmitted by The Ohio Oil Company to such party and accepted and received by such party in payment of the amount due to such party, and that such statement rendered by the defendant and such payment and acceptance and receipt by the parties plaintiff herein, constitutes an account stated and an accord and satisfaction of all claims between the parties hereto for the period covered by said statement.

Dated this 23rd day of December, A.D. 1949.

W. H. EVERETT,

LOUIS P. DONOVAN,

Attorneys for Defendant.

[Endorsed]: Filed December 23, 1949. [126]

In the District Court of the United States, in and
for the District of Montana, Great Falls Division

Civil No. 956

POTLATCH OIL AND REFINING COMPANY,
a Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN, and ROY E.
LARSON, as Trustees of That Certain Trust
Known as INLAND EMPIRE OIL AND
GAS SYNDICATE, a Common Law Trust,
Plaintiffs,

vs.

THE OHIO OIL COMPANY, a Corporation,
Defendant.

OPINION

The above-named corporations, including the trustees of the common law trust, plaintiffs and defendant, assisted by able counsel, accompanied by voluminous records and briefs, are here engaged in an effort to reform, or prevent the reformation, of a written agreement between the parties, or their predecessors in interest, for the development of oil and gas lands, in Glacier County, Montana, entered into over a quarter of a century ago; out of which the plaintiffs are said to have been paid under the terms of the agreement over \$400,000 and the defendant has received therefrom over \$500,000; the latter having undertaken the hazard of drilling the first well on the lands described in the agreement—free of all cost to the plaintiffs, or

their predecessors in interest. They were all "oil men" and engaged in leasing and developing lands for the recovery of oil and gas, and knew, or should have known and understood, the forms and terms of oil leases and contracts of that kind in general use in the field of their operations, and should therefore be distinguished from persons engaged in other pursuits, who have leased prospective oil lands for speculative purposes and who were not familiar with the details of oil leases and contracts and therefore are obliged to rely to a great extent on the interpretation placed upon such instruments by persons experienced [128] in the oil and gas industry. So that, to begin with, in judging of parties and conditions it would appear that we are not dealing with neophytes in the development of oil and gas lands.

The written agreement in question here was made and signed June 15, 1922, by and between Troy-Sweet Grass Oil Syndicate, a common law trust, hereinafter known as Troy, as part of the first part, predecessor in interest of the above-named plaintiffs, and The Ohio Oil Company, hereinafter known as Ohio, as the party of the second part, by the terms of which written agreement the first party sold and assigned to second party an undivided 55% interest in and to the leases and lands therein described, being Tracts 152, 153, 154, 155 and 156 on Map marked Ex. W. Tr. 255. Ohio took possession of the said lands in July, 1922, and drilled for oil and gas, which resulted in production of oil in commercial quantities.

On June 1, 1923, Troy assigned an undivided one-half of its remaining 45% interest in the "Baker Lease" to Inland Empire Oil and Gas Syndicate, known hereinafter as Inland. August 18th, 1923, Troy assigned all of its interests in all of the leases and lands described in said agreement, including the remaining 22½% interest in the Baker Lease, to Potlatch Oil and Refining Company, hereinafter referred to as Potlatch.

The principal bone of contention on the part of plaintiffs seems to arise over interpretation of paragraph III of the agreement which provides: "In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and as is consistent with good business management. It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the [129] first part forty-five (45%) per cent thereof. Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) per centum of the proceeds thereof at the prevailing market price of the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof. The said party of the second part shall be reimbursed by the said party of the first part solely from the first party's proportion of

the oil and gas produced and sold from said land. Application from proceeds from sale of said oil and gas will be made to the credit of the first party's account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The party of the second part shall be entitled to and shall charge the party of the first part eight (8) per centum interest upon all moneys so advanced for the development and operations upon said lands for the account of the interest of the first party's until the same shall have been paid out of the proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production.

"IV. The party of the second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expenses of developing and operating said lands and leases and will remit monthly to the party of the first part all proceeds of the oil and gas sold from the interest of the first party over and above the amount necessary to reimburse the party of the second part for expenditures made by it for the account and interest of the party of the first part.

"V. The party of the first part through its duly authorized agents or representatives shall at all reasonable times have access to the buildings, lands and property hereinabove [130] for the purpose

of examining the operations thereon and the production therefrom, and at all reasonable times during business hours shall have the right to examine the books and records of the party of the second part insofar as they pertain to the operations conducted under this agreement.”

It appears that all monthly statements required by paragraph IV were furnished to Troy beginning with August, 1922, and thereafter to its assignees, Potlatch and Inland.

It appears that all payments were made according to agreement, and that wherever an error or mistake occurred a correction was made, and that all checks and vouchers were received by plaintiffs, and that all such checks were cashed; there seems to be little if any dispute in respect to book-keeping and payments by Ohio. The first complaint about overcharges seems to have come from Inland September 11th, 1923, to the effect that “overhead expenses” and other charges were improperly included in monthly statements; on September 22nd, 1923, Ohio answered by letter and rejected Inland’s claim and held that all charges were properly made according to the written agreement.

Counsel for plaintiffs wrote Ohio on July 17, 1925, objecting to charges made, demanding a correction and proposing a conference for a settlement of disputes in lieu of suit. Ohio responded July 21, 1925, in a letter to plaintiff’s attorneys that “while we feel that the charges were carefully prepared and are entirely justified, representative of the company will be glad to meet you and

discuss with you fully and frankly any items your companies are complaining of. * * *'' The meeting occurred on August 7, 1925, and as a result plaintiffs' attorneys agreed to furnish Ohio with written objections to its charges, and complied on the following day. On September 12th, 1925, Ohio replied, refusing to make any changes in its charges and gave reasons therefore. [131]

From a stipulation of facts dated October 28, 1949, it appears that F. E. Hurley, who negotiated and signed the agreement, representing the Ohio, died more than 18 years prior to the commencement of this action; that A. M. Sellery, who negotiated and witnessed the agreement on behalf of Ohio, died more than 20 years prior to this action; that F. R. Firman, who rejected plaintiffs' contentions in 1925 on behalf of Ohio, died about 5 years prior to this action, and that John McFadyen, Division Manager, Rocky Mountain Division, of Ohio, died more than 3 years prior to commencement of this action.

According to defendant "No reply of further action was heard from or taken by plaintiffs to the type of charges made under this agreement until May 20, 1936, and June 9, 1936," when plaintiffs wrote a letter to Ohio objecting to charges made on account of certain automobile and trucking expenses, holding that such charges were not within the letter or spirit of the agreement under which Ohio was operating. On July 1, 1936, Ohio replied to plaintiffs' complaints objecting to the

foregoing charges and refused to make any change in such charges.

It appears that nothing more was heard from plaintiffs nor was any action taken about complaints made of improper charges by Ohio until the spring of 1946, which is said to have been more than three years after Ohio had sold and disposed of its entire interests in the agreement to the Texas Company. At the time aforesaid, spring of 1946, counsel for plaintiffs asked Ohio for an accounting and settlement of improper charges alleged to have been made under the terms of the agreement, and which had been presented to Ohio for adjustment and settlement by plaintiffs on different occasions in 1923, 1925, and 1936, and had been refused in each instance [132] as was the proposal in the spring of 1946. The following spring this action was commenced.

Ohio offered evidence that it had other agreements like the one in suit with other persons in the Glacier County oil fields, and of the same date, June 15th, 1922, had other like agreements with Troy and Potlatch covering other leases, and that no complaints were made about them. Plaintiffs objected to any evidence of other leases by Ohio, and the court will sustain the objection, such evidence apparently serving no material purpose.

The motion by defendant to dismiss the suit was denied with the right reserved of renewal at the time of trial; one of the questions raised therein was that the suit is barred by the statutes of limitation, and this seems to present an important

issue, and especially so since hearing the evidence given at the trial.

As to the language of the agreement in controversy there seems to be no difficulty in understanding its meaning, and it should be remembered that the parties entering into this agreement were engaged in the production of oil and gas, and familiar with the terms of contracts and leases relating to such industry, and knew or should have known the meaning of the language contained in the agreement to which they affixed their signatures. The Court has stated that the language in question is plain, but that does not mean that it may not have been misused in the sense that it might enable the defendant to indulge in an unlimited expense account; having control of the purse strings of production defendant could charge to the account of plaintiffs items that had to do either proximately or remotely with "all costs and expenses of developing and operating said lands for oil and gas purposes." But defendant has insisted from the beginning that all charges have been properly made. [133]

This case bears some resemblance to the Vande Putte case, discussed by counsel in their briefs, and found in 35 Fed. Supp. 794, wherein this court said; "Under that language it would seem that nearly everything having any connection with the drilling of a well has been charged against the plaintiffs in the joint account, and no matter how much oil was produced, the plaintiffs might find themselves no better off at the finish than they were in the beginning, unless some limitation was placed somewhere on this apparently unrestrained

charging power of the defendant." There the accounting of defendant found the plaintiffs deeply in debt, and the court decided that improper charges had been made in the account. That case was decided by this court in favor of plaintiffs; was appealed and before the appeal was considered by the higher court, a settlement occurred and the appeal was dismissed. The phraseology of the Vande Putte agreement was much different from this case; in that case the plaintiffs, lessors, were repeatedly assured over a long period of time by the defendant, lessee, that they would get together and consider the charges, and that all proper adjustments would be made, but the lessee never kept its agreement to make good these assurances, and finally the plaintiffs brought suit, and the parties stipulated that defendant would submit an account of all charges made under the agreement for determination by the court; this was done and the court eliminated all charges deemed to be improper under the agreement; the defense of laches and limitation of actions was pleaded by defendant, but was denied by the court. If any laches existed in that case, the court held that both sides were equally blameable.

The testimony of Mr. Jones seems to relate to a different agreement from the one at issue in this case; as it appears to the Court no such interpretation or understanding as he has suggested could be entertained without writing a new agreement; such a modification could only have been made by another [134] agreement in writing or by

any executed verbal agreement; nor could the purported verbal statements of the deceased Ohio representative have been effective to toll the statutes of limitations unless they were submitted in writing. Sec. 93-2716 R.C.M. 1947. From all the evidence and rules that appear applicable it does not seem that this testimony is necessary to prevent an injustice being done in this case. Sec. 93-701-03; *Phelps v. U. C. Life Ins. Co.*, 105 Mont. 195; *Langston v. Currie*, 95 Mont. 57; *Wilcox v. Schissler*, 55 Mont. 246; *Armington v. Steele*, 27 Mont. 13; 93-401-13 R.C.M. 1947. This Court cannot write a new agreement for the plaintiffs 28 years after it was entered into by the parties, when such agreement was stated in plain terms and was made, and read, and signed by intelligent and experienced operators in this particular line of industry.

Having considered the arguments in favor of and in opposition to the admission of the testimony of Mr. Jones, and numerous authorities cited by counsel for the respective parties, the Court is now of the opinion that the objection thereto should be sustained and such will be the order of Court herein. Even if this testimony were admitted it could be of little probative value as affecting the bar of the statute of limitations, since a continuous and unvarying course of conduct on the part of the defendant has been established by convincing proof over a period of about 25 years during which defendant refused to make any such changes in its charges as were requested by plaintiffs or their representatives.

It appears that plaintiffs finally brought suit in 1947, after all but one of the representatives of defendant who had participated in the making of or execution of the agreement, or had any definite knowledge concerning it, had died. In the Court's opinion this is a tardy suit and the laches of plaintiffs and the statutory limitations cited by counsel would bar [135] recovery under plaintiffs' claim. From a perusal of the facts and contentions of counsel the Court is unable to agree that this undertaking constituted a joint adventure and thereby imposed obligations upon defendant as a trustee for plaintiffs.

A long discussion ensued on the part of counsel on the subject of an account stated which arose over the monthly statements and payments by defendant to plaintiffs, and many authorities have been cited by counsel in support of their respective views. Upon examination of authorities it would appear that when plaintiffs accepted the monthly statements, entered into settlements thereof and accepted payments therefor, over a period of many years, in the sum total of about \$400,000, well knowing that defendant had repeatedly refused to make any changes in its charges such as plaintiffs proposed, and that the latter was bound to know that the intention was to make the payment in full settlement, it would seem that the rules governing the interpretation of an account stated would favor the defense in this case, as appears to be indicated by the greater weight of authority. *Norum v. Ohio Oil Co., et al.*, 83 Mont. 353; *McNab-*

Bess Oil Co. v. Commonwealth Oil & Gas Co., 52 Pac. (2) 3633; Jensen v. Cloud, 107 Mont. 593; 88 Pac. (2) 36; Sawyer v. Somers Lumber Co., 86 Mont., 169, 179.

In view of the foregoing it becomes apparent that the Court is of the opinion that the defendant should prevail in this suit, accordingly findings of fact and conclusions of law, and form of judgment may be submitted; costs go to defendant. Exceptions allowed plaintiffs.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed January 22, 1951. [136]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried to the Court without a jury, and the Court having considered the trial briefs presented by counsel and upon consideration of the pleadings, record and the competent evidence herein and being fully advised, found issues of law and fact in favor of Defendant and against Plaintiffs, as more fully appears in an opinion heretofore filed herein on January 22, 1951; and therein provided that findings of fact and conclusions of law may be submitted, together with form of judgment. Accordingly such findings of fact and conclusions of law have been submitted, and the Court in supplementing said opinion now makes the following findings of fact and conclusions of law:

Findings of Fact

The Court finds that:

1. The Plaintiff, Potlatch Oil and Refining Company, is a Montana corporation.

2. The Plaintiffs, Jean P. Gerlough, Stanley H. Hodgman and Roy E. Larson, are residents of Montana and are the trustees of that certain common law trust known as Inland Empire Oil and Gas Syndicate. [138]

3. The Defendant, The Ohio Oil Company, (hereinafter called "Ohio") is an Ohio corporation having its principal office and place of business in Findlay, Ohio, and is authorized to engage in business in the State of Montana.

4. On June 15, 1922, Plaintiffs' predecessor in interest, Troy-Sweet Grass Oil Syndicate, a common law trust, acting by and through T. P. Jones, who bought into and had command of it as an owner and as trustee, president and general manager, entered into a written agreement with Ohio for the development and operation of the oil and gas leases in Toole County, Montana, therein described and on the same date and concurrent therewith assigned to Ohio an undivided 55% interest in and to said leases. The pertinent portions of said agreement are set forth in the Court's opinion filed January 22, 1951, referred to above, and the Court finds that said agreement was and is plain and free from ambiguity and is clear, explicit and unequivocal in its language, terms and provisions

and that Ohio at all times has fully complied with each and all of the obligations therein imposed upon it.

5. T. P. Jones, F. E. Hurley and all of the other persons who negotiated and prepared the agreement of June 15, 1922, were engaged directly or indirectly in the production and development of oil and gas leases and lands and were experienced in that business and knew or should have known and understood the meaning of the plain language used and contained in said agreement which was entered into at arm's length.

6. On January 1, 1923, Troy-Sweet Grass Oil Syndicate, (hereinafter called "Troy") acting by and through T. P. Jones, as aforesaid, assigned an undivided one-half of its remaining 45% interest in the Baker Lease, one of the leases included in said agreement with Ohio to Plaintiff, to Inland Empire Oil and Gas Syndicate, (hereinafter called "Inland"). On August 18, 1923, Troy assigned [139] all of its interests in all of the leases and lands described in said agreement (including the remaining 22½% interest in the Baker lease) to Potlatch Oil and Refining Company (hereinafter called "Potlatch").

7. On or about July 5, 1922, Ohio entered into possession of the leases included in said agreement and commenced drilling for oil and gas thereon, resulting in production of gas in commercial quantities on September 18, 1922, and production of oil in commercial quantities on January 27, 1923. After

production was obtained monthly statements of account, as required by said agreement, setting forth all costs and expenses of development and operating said lands were made by Ohio to Troy commencing in August, 1922, and thereafter until Troy assigned to Inland and Potlatch. After Inland and Potlatch acquired their interests the monthly statements were made to them. For those months in which the income from the lands and leases exceeded all costs and expenses of developing and operating the lands, said statements were accompanied by Ohio's check under transmittal voucher which clearly indicated thereon that the remittance and check were in full settlement or in full payment of the respective items for the respective months. All the checks and vouchers were received by Troy and Plaintiffs, the checks were cashed and the money retained. At no time during the period subsequent to Ohio entering into possession and prior to the time that Troy assigned to Inland and Potlatch were any objections ever made by Troy to Ohio with reference to the accounting which included the same items as subsequent statements of account made to Inland and Potlatch. During the period between the commencement of production and January 31, 1943, the date Ohio disposed of all of its interest in said contract and leases, Ohio paid to Inland and Potlatch a sum of approximately \$400,000 over and above their respective shares of all costs and expenses of developing and [140] operating said lands for oil and gas purposes. Said payments were received

and accepted by Plaintiffs during all of said period well knowing that Ohio had repeatedly refused to make any changes in its charges such as plaintiffs proposed and Plaintiffs knew or should have known that the payments were made by Ohio in full settlement of the respective items covered in its respective monthly statements.

8. In 1923, 1925, and 1936, Plaintiffs made complaint to Ohio with reference to the charges made by Ohio for expenses of operation and development and in each instance Ohio refused to make any changes in its charges as requested by Plaintiffs and maintained a continuous and unvarying course of conduct throughout the entire period as established by convincing proof under which it flatly and unequivocally refused to make any such change. Ohio during all of said period steadfastly maintained that the charges and its accounting were in strict accordance with the terms and provisions of said agreement of June 15, 1922.

9. Mr. F. E. Hurley, who negotiated and signed the agreement of June 15, 1922, on behalf of Ohio, died more than eighteen years prior to the commencement of this suit (March 18, 1947). Mr. A. M. Sellery, who negotiated and witnessed the agreement of June 15, 1922, on behalf of Ohio, died more than twenty years prior to the commencement of this suit. Mr. F. B. Firmin died about five years prior to the commencement of this suit. Mr. John McFadyen, who was Division Manager, Rocky Mountain Division of Ohio, at the time said

contract was entered into and for approximately twenty years thereafter, died more than three years prior to the commencement of this suit. [141]

Conclusions of Law

The court declares the following conclusions of law to be pertinent and applicable to the foregoing findings of fact, to wit:

1. That the agreement of June 15, 1922, between Troy and Ohio contained the full and complete agreement and understanding of the parties thereto; is clear and explicit, does not involve an absurdity and was and is binding upon the parties, their successors and assigns. The intention of the parties must be ascertained from the agreement alone and it may not be explained, interpreted, reformed, varied, modified or amended by parol evidence or reference to matters outside of and not recited in said written agreement. T. P. Jones' testimony as to the alleged remarks by John McFadyen, deceased manager of Ohio, is not admissible for any purpose. No foundation for such testimony has been made and no injustice will be done by excluding such testimony. The validity of the agreement is not in dispute and no mistake or imperfection of the writing is put in issue, nor is the contract claimed to be illegal or fraudulent. The court has no power to alter or amend the contract which the parties themselves made.

2. That Ohio through a continuous and unvarying course of conduct on its part under the plain

requirements of said written agreement, since the execution thereof and at all times thereafter during the period questioned in this suit, in all things complied with the clear terms and provisions of said written agreement of June 15, 1922.

3. Laches in asserting their claims bar Plaintiffs from any recovery herein.

4. The statutes of limitation of the State of Montana bar Plaintiffs from any recovery herein.

5. Ohio is not a trustee for Plaintiffs. [142]

6. The monthly statements of account furnished by Ohio to Troy, Potlatch and Inland and the acceptance and retention of the moneys paid to them respectively by Ohio with knowledge that Ohio repeatedly refused to make any changes in its accounting and made each payment in full settlement of each statement constitutes an account stated between Ohio and Plaintiffs and may not now be challenged by them.

Plaintiffs shall have exceptions to each and all of the foregoing Findings of Fact and Conclusions of Law. It Is Ordered that plaintiffs recover nothing and that Defendant do have judgment in its favor and shall recover from Plaintiffs all costs herein expended.

Dated and done in Open Court this 24th day of February, 1951.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed February 24, 1951. [143]

In the District Court of the United States in and
for the District of Montana, Great Falls Division

Civil No. 956

POTLATCH OIL AND REFINING COMPANY,
a Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN, and ROY E.
LARSON, as Trustees of That Certain Trust
Known as INLAND EMPIRE OIL AND
GAS SYNDICATE, a Common Law Trust,

Plaintiffs,

vs.

THE OHIO OIL COMPANY, a Corporation,

Defendant.

JUDGMENT

This matter having come on for trial before the Court on the 22nd day of December, 1949, trial briefs having been thereafter submitted and the Court having rendered a written memorandum decision filed herein on January 22, 1951, and having made supplemental findings of fact and conclusions of law on the 24th day of February, 1951;

It Is Ordered, Adjudged and Decreed that Plaintiffs take nothing by this suit and that the Defendant recover all its costs herein expended, and said costs are assessed in the sum of \$349.07; Exceptions allowed Plaintiffs.

Done in Open Court this 24th day of February, 1951.

By the Court:

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered February 24, 1951. [145] ———

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT .

Notice is hereby given that Potlatch Oil and Refining Company, a corporation, and Jean P. Gerlough, Stanley H. Hodgman, and Roy E. Larson, as Trustees of that certain trust known as Inland Empire Oil and Gas Syndicate, a common law trust, Plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 24th day of February, 1951.

/s/ E. J. McCABE,

/s/ E. J. McCABE, JR.,

Attorneys for Appellants, Potlatch Oil and Refining Company, a Corporation, and Jean P. Gerlough, Stanley H. Hodgman, and Roy E. Larson, as Trustees of That Certain Trust Known as Inland Empire Oil and Gas Syndicate, a Common Law Trust.

[Endorsed]: Filed March 26, 1951. [147]

In the District Court of the United States, in and
for the District of Montana, Great Falls Division

Civil Action No. 956

POTLATCH OIL AND REFINING COMPANY,
a Corporation; JEAN P. GERLOUGH, STAN-
LEY H. HODGMAN, and ROY E. LARSON,
Trustees of That Certain Association Known
as INLAND EMPIRE OIL AND GAS SYN-
DICATE,

Plaintiffs,

vs.

THE OHIO OIL COMPANY, a Corporation,
Defendant.

PROCEEDINGS

Before: Honorable Charles N. Pray,
United States District Judge.

December 22nd and 23rd, 1949

Appearances:

ERNEST J. McCABE,
Attorney at Law,
For Plaintiff.

LOUIS P. DONOVAN,
Attorney at Law;

W. H. EVERETT,
Attorney at Law,
For Defendant. [152]

Be It Remembered, That the above-entitled cause came on regularly for hearing in the United States District Court, in and for the District of Montana, in the Federal Building, at Great Falls, Montana, on December 22nd and 23rd, 1949, before the Honorable Charles N. Pray, United States District Judge, presiding.

(Whereupon the following proceedings were had and done, to wit:)

The Court: Gentlemen, are you ready to proceed with this matter this morning?

Mr. McCabe: Plaintiffs are ready, your Honor.

Mr. Donovan: May it please the court, we have been discussing with counsel for the plaintiff the extent of the hearing today, and I think we agreed with counsel that if it is agreeable to the court that only the preliminary matters would be determined today, or heard and determined in this hearing, namely, the issues that must be determined as to whether or not the plaintiffs are entitled to an accounting at this time.

The Court: I see. Well, as I understand——

Mr. Donovan: We tried to reduce that to a stipulation but we didn't seem to get together quite on the wording of the stipulation.

The Court: Before we get to the point of an accounting, actual accounting, we have been overruling the [157] motion to dismiss, and, of course, there is something about your renewing those questions of law later on in the trial, and I suppose what you want to do this morning is put in such evidence as may be necessary to fully inform the

court. One of the reasons I overruled the motion was their setting up the bar of statutes and laches, and I didn't think sufficient appeared on the face of the complaint to warrant any other course to pursue then, and I would like to have you put in some evidence especially on that point with the point to bar of statute and laches; I want to see what there is in that because of the great lapse of time between the first conference and the beginning of the suit.

Mr. Donovan: Yes, your Honor.

The Court: I would like to have you make it as clear as possible on that point.

Mr. Donovan: If the court will permit me, I would like at this time to move that Mr. W. H. Everett of Casper, Wyoming, be admitted to practice law in this court for the purpose of this case. Mr. Everett is a member of the Bar of the State of Wyoming and the Supreme Court of the United States.

The Court: Very well, he may be admitted to practice in this court for that purpose.

Mr. Everett: Thank you, sir. The court referred to the first item I had set forth and that was the court's [158] Order of April 7, 1948, in which the court overruled the defendant's consolidated motion for severance of claims, to dismiss for lack of capacity to sue, to dismiss on ground of statute of limitations, for more definite statement, and to strike certain portions of plaintiffs' complaint. The court stated in that order that, "The court is now of the opinion the motion should be denied with

the right reserved of renewal of said motion or any appropriate subdivision at the trial of said cause, and such is the order herein.”

We would like to reassert that motion in its entirety, but go ahead and proceed, if we can, under Rule 42 (b) of the Federal Rules, as amended, simply preserving every right and all of our positions which were asserted in that motion and not be considered to have waived any of them, but not insisting that the court again rule on the motion at this particular moment.

Rule 42 (b) provides that the court for its convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, or any third-party claim, or of any separate issue, or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.

In that connection and without waiving the rights we have under the motion we feel that now would be a proper time for the court to enter an order so we will know the extent and scope of the hearing; and Mr. Donovan had prepared [159] a stipulation, as had Mr. McCabe, in an effort to stipulate on those issues that would be disposed of this morning, and we were unable—I was unable to get the gentlemen in agreement in connection with it, and I might say——

The Court: Can't you proceed short of an accounting?

Mr. Everett: Yes, we can proceed short of an accounting, your Honor, and that I think is what both parties want to do at this time. However, I

believe it would be proper to have an order entered and we have prepared an order which can be changed somewhat, and I will be glad to have the court hear Mr. McCabe on the matter. I would say that the parties are in agreement; that the preliminary issues as to statute, the laches, that they are in court on that issue being tried today; the issue as it is set up in defendant's second and third affirmative defenses, which are the statutes of limitation of Montana; and that the court determine also as a preliminary issue the merits of the four affirmative defenses, which is the matter of accounts stated, and the court make a finding on those matters prior to the time that any of those issues—I mean prior to the time that any question of accounting is considered.

Now the only item where the parties are at variance, and I think my observation is we are somewhat in accord in principle and it might be in the matter of stating [160] it. Mr. McCabe sent to me a proposed form of stipulation in which there is item (a) and he proposes to stipulate the issue should be interpretation and meaning of the operating contract described in plaintiffs' complaint. Well, I couldn't conscientiously stipulate to that as being a correct statement of the issue. First, it was too broad. Secondly, insofar as our position is concerned the contract speaks for itself and needs no interpretation; so that its meaning is clear we think. That is our position, of course. But we do have and I will read from the proposed order

what we believe is a proper statement on that one item.

Mr. McCabe: Have you got a copy of the proposed order?

Mr. Everett: Did you get the one in the mail Mr. Donovan sent to you day before yesterday?

(Whereupon an off-the-record discussion was had by counsel.)

Mr. Everett: The proposed order on that one item and as we think the issues should be stated, your Honor, is as follows, and I will read it:

“(a) That the court determine, as a preliminary issue, whether oral evidence of the character offered by the deposition of T. P. Jones on file herein (Deposition of T. P. Jones, pages 12, 13, 17, 19, 52, 57, 58) to the effect that it was orally agreed by the parties thereto that no expenses [161] would be charged to Troy-Sweet Grass Oil Syndicate, or its successors, where same were incurred “off of the lease or any place off of that lease” or for overhead or supervision of operations in the development and production of the lease or even for pumping wells situated thereon (Deposition of Jones, pages 12, 13, 17, 19), and that no cost of operation of wells after the well was drilled and put on production was to be chargeable to Troy-Sweet Grass Oil Syndicate, or its successors (Deposition of Jones, page 52), and that the intention of the parties to the operating agreement was to the effect that the Ohio Oil Company should drill the wells and put them in production, and that

Troy-Sweet Grass Oil Syndicate should pay its 45% of such expenses, and from there on should pay nothing and be chargeable with nothing for operation (Deposition of Jones, page 53) or any similar oral testimony from other witnesses to such effect is admissible for the purpose of (a) modifying or explaining the terms of the Operating Agreement, a copy of which is attached to Plaintiffs' Complaint herein marked Exhibit "A" thereof, or (b) interpreting the same along the lines above indicated. And if the court finds that such testimony is admissible, then that the court further find what the actual agreement dated June 15, 1922, between Troy-Sweet Grass Oil Syndicate and The Ohio Oil Company was in regard to such matters, and that the court adjudge and declare the true and actual meaning of [162] the said Operating Agreement made and entered into between Troy-Sweet Grass Oil Syndicate, as party of the first part, and the Ohio Oil Company, as party of the second part, dated June 15, 1922, a copy of which is attached to Plaintiffs' Complaint herein and marked Exhibit "A" hereof; and what costs and expenses of developing and operating said lands for oil and gas purposes, as incurred by the Ohio Oil Company, could properly be charged in part (to the extent of 45% thereof) to Troy-Sweet Grass Oil Syndicate, and its successors in interest."

Mr. McCabe: With respect to this proposed order, your Honor, it seems to me that it attempts to state one part of the deposition without considering other evidence in the deposition. The ques-

tion presented by this proposal here is that preliminary testimony along these particular lines stated by counsel whether that is admissible without the order further showing that this preliminary testimony is a part of the conversation immediately preceding the setting up of the final agreement, and that these terms, the attorney for the defendant company said he would incorporate into the written agreement and he went away and came back with a written agreement changing the participating interest from fifty-fifty to forty-five to the Plaintiffs, or to the Troy-Sweet Grass, which is the agreement involved, and fifty-five to the Ohio Oil Company. And again the objection was made [163] to that that it didn't state the agreement because it didn't conform to their understanding that the expenses would be limited to certain charges, and that this will consider all the deposition, and that the attorney for the company, the company prepared the entire written agreement, he went away and returned with another agreement and pointed out to Mr. Jones a clause which expressly limited the charges to be made, which said that in no event shall the party of the first part, that is the Sweet Grass Company, the predecessor in interest of the present Plaintiffs, would be finally held or charged beyond its interest in the equipment and the production in and from the land. And Mr. Jones' testimony is to the effect that no, that it was understood that no charges would be made for any expenses off of the lease, no overhead charges of 10% which was put into the agreement, and counsel for

the defendant returned and explained to Mr. Jones that under that clause it showed that the expense was limited, and that thereafter they cannot start charging all over the country, trips to Casper and all over the country, and put in an arbitrary overhead of 10% not even provided in the contract, and he goes ahead and explains that. Now we say by reason of the first part of the contract which provides that the Ohio Oil Company should operate and develop the company and be reimbursed for expenditures on the basis of the forty-five per cent charged against the Troy-Sweet Grass, and [164] then the latter part a clause in the same paragraph, as I recall, turns right around and expressly limits that expense to definite interests in the company in the equipment and not upon the land. And I say that, your Honor——

The Court: That is what this witness testifies to, is it?

Mr. McCabe: What is that?

The Court: That is what this witness says in the deposition?

Mr. McCabe: Yes, that all appears in there.

The Court: Well, of course, we will have to thrash that out and see what they say or the other says. We have got to get both sides of this. Did they finally sign the contract, did they?

Mr. McCabe: Yes, your Honor.

The Court: The Troy Company signed the contract?

Mr. McCabe: Yes, this was right at the time.

The Court: After they had this discussion and just talked it over they signed the contract?

Mr. McCabe: Exactly. And then there were three different drafts of that contract presented.

Mr. Everett: I don't want to interrupt Mr. McCabe——

The Court: You object?

Mr. McCabe: I object, naturally. [165]

The Court: About the affidavit of Jones, is it?

Mr. Donovan: Yes, your Honor, that is the testimony of Jones.

Mr. Everett: Here is the proposed order, the one we are discussing, your Honor.

The Court: I don't know that there is anything so urgent about any order being signed so far as we are now concerned, and we can have the understanding we will go into this case and develop it, and you have your motions in mind and reserve them, and take evidence and see how far we can go, and then wait and see what we are going to do before we reach the point of an accounting or making any order in respect to it. Isn't that about the situation?

Mr. Everett: We, of course, would like to have the issue defined, your Honor, if we could, your Honor, by an appropriate order, and I don't mean to be sticky or stuffy about it but I would like to know just how far we are expected to go.

The Court: You have got a complaint and answer, haven't you, and you have got your motions?

Mr. Everett: Yes.

The Court: Those points are all material to this, aren't they?

Mr. Everett: Yes, sir.

The Court: And also the allegations of [166] the complaint. Well, now, short of an accounting can't you go ahead under the pleadings as they stand?

Mr. Everett: If the accounting phase is left out, I would think that we could. Just from the experience I have had in other matters I am afraid what we will find we will get down here in some of the presentation and we will make some objections and find things which may be related to accounting or related to something else not spelled out in the issues and that is why I thought it was important in making a good record of the case and for the court's convenience and orderly presentation that we try and outline——

The Court: Here is an order here Mr. McCabe hasn't seen until this morning and I don't want to force him to go into it immediately; let him have time to look it over and perhaps he will agree with you. Perhaps you two will agree on an order the court may sign. It is all right with the court if you can.

Mr. Everett: I will be glad to make that effort, your Honor.

The Court: Perhaps you can eliminate some things, If you served this before, he probably would be able to tell what he wanted to do.

Mr. McCabe: Yes, your Honor, yesterday afternoon at five o'clock I received this letter and counsel

very graciously let me look at the stipulation set forth upon which [167] this order is based, and I looked the stipulation over and it looked to me from the stipulation that to proceed on the stipulation they wanted to separate certain issuable facts in regard to this proceeding, which would naturally prejudice me in the presentation of my case, and I told them I wouldn't be willing to do so. However, I prepared a form of stipulation, your Honor, which I submitted to them which I think covered all the points and at the same time protects me in the presentation of my case.

The Court: Without any further discussion about it I will give you a half an hour to see whether you can get together and make an order and if not, we will proceed anyway.

Mr. Everett: Thank you.

(Whereupon court recessed at 10:30 a.m.)

(Court resumed, pursuant to recess, at 11:00 o'clock a.m., at which time all counsel were present.)

The Court: Proceed.

Mr. Everett: May it please the court, we have arrived at a wording that is satisfactory for the order, and I apologize for the present looks of it and if you like, we can have it rewritten.

The Court: No, it is all right.

Mr. Everett: We understand, your Honor, that this is without prejudice to anything that may have been [168] asserted in our motion.

The Court: Oh, yes, of course. Some evidence

probably will be introduced and you will object to it, and the court will receive it subject to your objection because I can see some important questions arise here that the court will have to consider later on after hearing the proof.

Mr. Everett: I think the record shows, but if it doesn't already show, I would like to show that we renewed our consolidated motion and submit it without further argument.

The Court: All right. Very well, you may proceed, gentlemen.

Mr. McCabe: Does your Honor desire a preliminary statement or should we just proceed with the evidence?

The Court: I think we can go ahead now. I think I have gathered enough of the case, that it won't necessitate reading of your complaint and answer and that you may proceed now to introduce your proof and your stipulation and order of court.

(Whereupon the said Order referred to on page 16 of this transcript is in words and figures as follows, to wit:)

In the District Court of the United States in and
for the District of Montana, Great Falls Division [169]

Civil No. 956

POTLATCH OIL AND REFINING COMPANY,
a Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN and ROY E.
LARSON, as Trustees of That Certain Trust
Known as INLAND EMPIRE OIL AND
GAS SYNDICATE, a Common Law Trust,
Plaintiffs,

vs.

THE OHIO OIL COMPANY, a Corporation,
Defendant.

ORDER

The Court, in furtherance of convenience of the parties and the Court, will order a trial of the claims of the respective parties, hereinafter specified; and the Court, being fully advised in the premises, and It Appearing to the Court that the convenience of the Court and parties to this action would be furthered by the granting of said request and ordering a trial upon the issues and claims hereinafter specified;

Now, Therefore, pursuant to the provisions of Rule 42 (b) of the Rules of Civil Procedure, It Is Ordered that the following issues be tried prior to any accounting that may be taken in this case, if an accounting is found necessary. Said issues and claims are as follows:

(a) That the Court determine, as an issue whether oral evidence of the character offered by the Deposition of [170] T. P. Jones on file herein or any similar oral testimony from other witnesses is admissible for the purpose of (a) modifying or explaining the terms of the Operating Agreement, a copy of which is attached to Plaintiffs' Complaint herein and marked Exhibit "A" thereof, or (b) interpreting the same; and if the Court finds that such testimony is admissible, then that the Court further find what the actual agreement dated June 15, 1922, between Troy-Sweet Grass Oil Syndicate and the Ohio Oil Company was in regard to such matters, and that the Court adjudge and declare the true and actual meaning of the said Operating Agreement made and entered into between Troy-Sweet Grass Oil Syndicate, as party of the first part, and the Ohio Oil Company as party of the second part, dated June 15, 1922, a copy of which is attached to Plaintiffs' Complaint herein and marked Exhibit "A" thereof; and what costs and expenses of developing and operating said lands for oil and gas purposes, as incurred by the Ohio Oil Company, could properly be charged in part (to the extent of 45% thereof) to Troy-Sweet Grass Oil Syndicate, and its successors in interest;

(b) That the Court determine, as an issue herein, the merits of the defendant's First Affirmative Defense set up in Defendant's Answer herein, pleading the defense of laches as a bar to the cause of action set forth in Plaintiffs' Complaint; [171]

(c) That the Court determine, as an issue herein,

the merits of the Defendant's Second Affirmative Defense and defendant's Third Affirmative Defense set forth in its Answer herein, wherein defendant pleads the five-year statute of limitations in its Second Affirmative Defense and the eight-year statute of limitations in its Third Affirmative Defense;

(d) That the Court determine, as an issue herein, the merits of defendant's Fourth Affirmative Defense set forth in its Answer herein, wherein defendant pleads in effect that there was an account stated between the plaintiffs herein and the defendant herein by their respective monthly statements; and

(e) That a finding and decision be made by the Court on the foregoing issues before any trial is ordered upon the question of an accounting herein.

Done in Open Court, this 22nd day of December, A.D. 1949.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed December 22, 1949.

Mr. McCabe: Your Honor, there are two depositions that go to the bearing of all of these questions and I think an orderly procedure requires us to introduce and read the depositions.

The Court: You may do that and perhaps the court will have to read them afterwards. You can

offer the [172] depositions. State the substance of them so the court will know what they are about and perhaps we don't need to go ahead now and read them and they will be received in evidence subject to the objection. I am referring now to your depositions that are calculated to vary the terms of a written contract, of your operating agreement, isn't that it?

Mr. McCabe: Yes, sir, we claim that they don't.

The Court: What is that?

Mr. McCabe: We claim they don't vary the terms of the written contract but explain it according to the statutory rule.

Mr. Everett: Our understanding with reference to the deposition and as stated in the Jones deposition was that this would be presented question by question so that we would have the opportunity to raise any objection with reference thereto as the record was made from the deposition and I think that that would be the better way to handle it, not only for the court's convenience but also for convenience of counsel. We could state, I suppose, in substance——

The Court: The depositions are here with the Clerk on oath?

Mr. McCabe: No, the Jones deposition is open in the form of an order of court to permit certain copies to be made for the exhibits.

The Court: Does the defendant have those [173] copies? Does the defense know what these depositions are?

Mr. McCabe: That was in another case. There

are two other cases against the Texas Company based on this contract. The Texas Company is the successor to the interests of the Ohio Oil Company in 1933 or 1934, and there were certain original exhibits and copies made a part of Mr. Jones' deposition, which are material in the trial of the Texas cases. Therefore, in order to identify these records as in the Jones deposition in this case by proper identification, and taking the depositions of Wilson it was necessary for us to obtain certified copies by the Clerk, and pursuant to that and with the consent of counsel, Mr. Donovan, that the depositions could be opened for the purpose of making these copies and later used in the Texas cases. We can expedite this matter very much if counsel would stipulate that the depositions of T. P. Jones and R. D. Wilson would be entered, would be deemed offered and received in evidence subject to the objections made by counsel at the time of the hearing and subject to the objection—well, it is pretty difficult to make a stipulation along the lines——

The Court: Of course, counsel would know what they were going to object to in those depositions. They are familiar with them, aren't you?

Mr. Everett: We would stipulate we would object to the entire deposition as being incompetent, irrelevant and [174] immaterial and contrary to the parol evidence rule, and I could go on and list a dozen, and if the court wanted to allow those objections to apply to each question in the deposition, the appropriate objection.

The Court: I suppose you have indicated what parts of it you object to?

Mr. Everett: I hadn't. Specifically and completely I hadn't, your Honor.

The Court: I am just trying to figure on time and save time and accomplish the same objects.

Mr. McCabe: Under the rule all objections made at the time the objection taken are waived by them objecting further, except the form of the question. No, that they must make objection to the substance of the testimony and that unless they do so the form of the question is waived. And there are two or three leading questions in there and we say the court in its discretion is authorized to permit them.

The Court: Of course, these were all taken on written interrogatories, were they?

Mr. McCabe: No.

Mr. Everett: No, these two are all oral interrogations, verbal interrogations.

The Court: All taken down and objected to and both sides represented? [175]

Mr. Everett: Both sides represented and the stipulation under which they were taken, however, expressly reserved to the defendant each and all of the defendant's objections to relevancy, materiality and competency of the testimony of Plaintiffs' witness, and any other objections we might have with the one exception, objection to form of question should be stated at the time the deposition was taken.

The Court: Well, you have practically covered it with your objections now.

Mr. Everett: If you would like me to read my summary of my objections, I believe I could do that.

The Court: There is no need of going through all that now. It is quite lengthy, isn't it?

Mr. Everett: This is 90 pages.

The Court: Of course, I will have to read it anyway. You can offer it and it may be received subject to the defendant's objections and you may state your objections in the record.

Mr. Everett: It being understood those objections, the applicable objection would apply to the applicable question and answer?

The Court: Yes, sure.

Mr. McCabe: That is right.

Mr. Everett: Well, without waiving the [176] right to have the matter presented by question and answer form——

The Court: If you are not going to agree to this, why we, of course, will have to go through the long way.

Mr. Everett: Let me finish my statement, your Honor; I think it will be all right.

The Court: All right, go ahead and finish it.

Mr. Everett: But in an effort to cooperate with the court and counsel for the plaintiffs we will state, the defendant will state its objections to the entire deposition and specific objections which might apply to parts thereof on the understanding that the appropriate objection shall apply and will be considered by the court in connection with each

respective question and answer in said deposition referred to or in the exhibits offered in connection therewith.

Mr. McCabe: Except as to the form of the question.

Mr. Everett: As to the form of the question which the court will consider only when the objection appears in the deposition to have been made to the form of the question.

Mr. McCabe: And the objection to questions of secondary evidence. If your Honor please, there were some copies the defendants had the original in its position and we had to have this witness identify copies and have them received in evidence in the event the defendant would fail or refuse to produce the originals in the trial.

Mr. Everett: I think we are going to have [177] to back up there. I don't know that I can go for that, Mr. McCabe. Are these the exhibits?

The Clerk (Mr. Kegel): They are in connection with the Jones deposition.

Mr. Everett: Well, I can't agree to Mr. McCabe's exception. Now, if you will back up to where I left off, I will try to go on with my statement.

Mr. McCabe: May the court have the reporter strike out that suggestion I made?

The Court: Very well, you may strike out the last suggestion made by Mr. McCabe, not being agreed to by counsel for the defendant.

Mr. Everett: The defendant waives any objection from the standpoint of the best evidence rule to Plaintiffs' Exhibit 26 attached to the Jones dep-

osition, Plaintiffs' Exhibit 2 attached to the Jones deposition, Plaintiffs' Exhibit 27 attached to the Jones deposition, Plaintiffs' Exhibit 29 attached to the Jones deposition, and states further in setting forth said objections that it appears from the deposition itself that Mr. Jones disqualifies and discredits himself as a witness in this case by his statements therein and that the entire deposition should be stricken. Moreover, and referring to the specific objections, the specific and general objections above alluded to they are hereby asserted as follows: Defendant objects to any testimony as to direct transactions [178] or oral communications between the proposed witness, T. P. Jones, and Mr. John McFayden, Mr. F. E. Hurley, Mr. A. M. Sellery, Mr. F. E. Firmin, or any other deceased agent of The Ohio Oil Company, all as provided by the statutes of Montana in such cases; objects to the testimony of T. P. Jones as being incompetent, irrelevant and immaterial to any issue in this case; objects to any testimony with reference to verbal negotiations or understandings had prior to June 15th, 1922, or up to the date of execution of the contract attached to plaintiffs' complaint herein as Exhibit "A," as being in violation of the parol evidence rule, and as an attempt to vary or contradict the terms of a written contract.

Defendant further objects on the further ground that the alleged cause of action, if any, is barred by laches and by the statutes, by the applicable statutes of limitations of the state of Montana. Defendant objects on the further ground that the

questions call for testimony which appears on its face to be an attempt to revise or modify the terms of a written contract. Defendant objects to the testimony on the grounds that it is contrary to the court's order and outside of the issues ordered to be tried by court order of December 22nd, 1949, and is an attempt to open an account stated.

Defendant objects to any testimony concerning oral conversations with Mr. A. H. Gee, in that it appears [179] from the written contract attached as Exhibit "A" to Plaintiffs' complaint herein that such contract was executed and put into effect by the signature of Mr. F. E. Hurley, and from the record that the contract, that said contract was made and entered into with Troy-Sweet Grass Oil Syndicate and not with plaintiffs, or either of them.

Defendant further objects to the questions and testimony offered by plaintiffs through this witness for the reason that plaintiffs not being parties to the contract of June 15th, 1922, are estopped to explain, vary, or contradict its terms by any evidence whatever, even assuming that there were any verbal representations or verbal understandings with reference thereto.

Moreover, if the written contract has not clearly set forth the understanding and agreement of the parties thereto, plaintiffs' remedy, if any, would have been an action for reformation which is barred by limitations of statutes of Montana.

Furthermore, plaintiffs instead of seeking reformation accepted vast sums of money in full payment for their representative proportionate parts

of the proceeds from the accounts stated which have clearly shown monthly for more than twenty years the costs and expenses charged under said contract, which said costs and expenses have at all times been specified in categories and in accounts stated contrary [180] to what plaintiffs contend the contract calls for if properly written in accordance with their contention, and plaintiffs are barred by laches, and this proposed testimony or evidence is not admissible for any purpose.

Defendant objects to the questions and answers on the further ground that Potlatch Oil and Refining Company by instrument dated August 18th, 1923, referred to in the papers and stipulation on file herein, and being an assignment from Troy-Sweet Grass Oil Syndicate to Potlatch Oil and Refining Company, expressly agreed to keep and perform the terms and conditions of said The Ohio Oil Company Troy-Sweet Grass Oil Syndicate agreement of June 15th, 1922, and that Inland Empire Oil and Gas Syndicate by written instrument executed in January, 1923, expressly acquired its interest subject to the interest of The Ohio Oil Company under said contract of June 15th, 1922.

Now, if you want to further shorten the matter and under the same statement that I have made, your Honor, with respect to the T. P. Jones deposition, if it is satisfactory with the court to handle in the same way, I am willing to make that same statement or have this same statement of objections apply to the Plaintiffs' deposition of R. E. Wilson; which you will offer?

Mr. McCabe: Before that I desire it be further stipulated as a part of this stipulation that questions to [181] the witness T. P. Jones and evidence and testimony in reply to, or in answer to such questions are subject to all valid legal objections which may be available thereto on behalf of the plaintiffs except as to the form of the question.

Mr. Everett: Then I understand that the court will make up the record then of the testimony of Jones and Wilson, ruling on these objections question by question as the court goes through them, is that my understanding?

The Court: Well, it seems to me that it might be disposed of in some other way. I don't know that I just got the drift of your further stipulation. The court now, of course, in going through the deposition would pass upon the objections made here and whatever stipulation you entered into in respect to the deposition.

Mr. McCabe: It seems any question or propriety of objection is determined by the final decision of the court and then on appeal the question whether this evidence is admissible or other evidence is admissible is available to the defendant. We can stipulate here all of the evidence and all of the questions are subject to objections, pertinent objections, therefore, I don't see any necessity of the court in its opinion going ahead and ruling on this question any more than you would incorporate in the court's opinion the evidence offered in the trial and say this evidence is offered.

Mr. Everett: What are you going to have [182] in the record?

Mr. McCabe: You are going to have this stipulation as part of the trial record.

Mr. Everett: Your thought is the entire deposition goes in on record as appealed?

Mr. McCabe: Sure.

Mr. Everett: We will do that. I was of the opinion the court would rule on our objection and sustain or overrule it, and as to those sustained why the record would so show, so that when we have a record of Mr. Jones' testimony if any part of it is admissible, it would be the question and answer itself rather than the whole thing because certainly most of this Jones deposition and I think all of the Wilson deposition are not proper testimony, and unless we can do that as a courtesy to the court, he has to go over it now and we are trying to save him the trouble of going over it today and again when he goes into it in chambers, and if we can do that, we might as well go ahead, and I want that record to show what went into it and what didn't go into it. My thought was the court in going through the deposition would apply the appropriate objection to this question and that question and would rule on it so the record would be made up in accordance with his ruling.

Mr. McCabe: That is in effect accomplished by this stipulation. [183]

Mr. Everett: I haven't stipulated to anything. I just stated I would do this. I am not agreeing

with you about it, Mr. McCabe. I said I will do that under those circumstances.

The Court: Well, of course, the court will have to go through the depositions the same as it does other depositions. There won't be any different rule applied here. The court will have to go through and make a ruling on all material matters except perhaps the form of a question objected as to leading or something of that sort would be of no consequence but any material objection that the court deems a material objection to some substantial matter and the court can rule on that.

Mr. Everett: Let me see if I understand it clearly, your Honor. Let's take this Jones deposition, for example——

The Court: Well, we will put it this way, the court will have to rule on the questions and answers and objections; does that cover it?

Mr. Everett: That covers it so what goes into the record shows the court's ruling. That is fine, sir.

Mr. McCabe: How about the Wilson deposition?

Mr. Everett: I will make the same statement with reference to the Wilson deposition. Do you have it so I can look at the exhibits and so I can cover that secondary [184] evidence for you, Mr. McCabe?

The Court: Any further documentary evidence and proof?

Mr. Everett: Sir?

The Court: Any further documentary evidence on the part of the plaintiffs, depositions or otherwise to be introduced?

Mr. McCabe: Yes, I agree to the Wilson under the same conditions as stated in the Jones.

The Court: After the Wilson what next is there? What other evidence have you got?

Mr. McCabe: Other evidence?

The Court: Other depositions, other documentary evidence.

Mr. McCabe: No, there is no further depositions. Now, there is oral evidence.

The Court: All right, call your first witness and let's begin.

Mr. Everett: You want to go through this Wilson deposition, Mr. McCabe? You want me to cover that matter of secondary evidence, and you have some exhibits attached to it as I remember it?

Mr. McCabe: I think that should be done.

Mr. Everett: In connection with the deposition of R. E. Wilson, offered by plaintiffs, we understand that the [185] court will rule on each question and answer and objections thereto as in connection with the deposition of T. P. Jones, and that the objections and exceptions as outlined by counsel for defendant in connection with the T. P. Jones deposition will be equally applicable to the deposition of R. E. Wilson.

Defendant waives any objection with respect to the following exhibits being copies rather than originals: Plaintiffs' Exhibits 4, 6, 8, 9, 11, 13, 14, 17, 18, and 18-a page 1 and 18-a pages 2, 19, 21, 21-a, 23; waive only the objection with respect to the secondary evidence rule, the best evidence rule, excuse me.

Mr. McCabe: You objected to 5?

(Whereupon counsel off the record checked the exhibits:)

Mr. McCabe: Now, Mr. Everett and Mr. Donovan, a notice to produce certain documents in the trial of the case and preliminary notice was served upon you, and preliminary notice or informative notice a couple months ago, and final notice to produce on December first, certain records and documents in the possession of the defendant. Do you have those records present pursuant to that notice?

Mr. Everett: We have such of them as we could find.

Mr. McCabe: Sir?

Mr. Everett: We have such of them as we [186] could find in our files and records. I might state in answer to your demand for No. 1 you demand that form or written agreement which Mr. F. E. Hurley and Mr. A. M. Gee had with them and which they submitted to Mr. T. P. Jones as a trustee of Troy-Sweet Grass Oil Syndicate on or about the 15th day of June for consideration during the negotiations, and in answer to that demand I would like to refer to the deposition of Mr. A. M. Gee, which will be opened—I can open it now, your Honor? I have a copy of it here.

The Court: Very well.

Mr. Everett: Do you want me to open it?

The Court: Yes. In connection with this other?

Mr. Everett: Yes, sir.

Mr. Everett: Let the record show that the depo-

sition of Mr. A. M. Gee is opened by the gentleman in the presence of counsel and the court. In which he states after the operating agreement was presented by him that no changes were made. That is in answer to written interrogatory, defendant's written interrogatory 7 (d) and (e).

And also his testimony in answer to plaintiffs' interrogatory 15, which referred to the Jones deposition, in which Mr. Gee is supposed to have stated or alleged to have stated that he would go and rewrite the contract and include it: "I will go and rewrite it and include it in there." Referring to the Jones, the statement in the Jones deposition which [187] is attributed to Mr. Gee. Mr. Gee stated, he answered that interrogatory that he did not. That we will object to your notice to produce, Mr. McCabe, in response to item 2. Has the original of your notice to produce been filed in the papers in this case?

Mr. Everett: How would the court like to do this? Would you like me to go through this list of documents, there are some 40 of them here, producing each of these, as we have, and explanation of those we haven't? What do you prefer? I have asked Mr. McCabe to produce a number of documents and we might get together and put together what we have, the letters he asked for and the responses I asked for.

The Court: Yes, you might do that, or when a witness is being examined and some reference is made to the article or document required then the explanation could come at that time. It may be

that some of these exhibits that have been requested on both sides won't be referred to at all; maybe they won't come in.

Mr. McCabe: I will be glad to do that because Mr. Everett served me with a copy Sunday of a notice and I proceeded to get busy, and we have acquired—here they are to give you an idea the letters, and some we could find and some we couldn't. So if we could get together before court opens this afternoon, we could then determine what we have and what we haven't, and what we could produce and what we [188] could not.

The Court: That is all right if you want to do it that way.

Mr. Everett: I might offer this further suggestion, Mr. McCabe, in order to keep the record down some. There are a number of documents you have called for and some I have called for about which there is no dispute and no necessity to produce them in the present state of the record, for instance the Troy-Sweet Grass contract copy attached to your complaint and which we admit is the contract.

Mr. McCabe: That can be covered by a brief stipulation when we get our letters submitted.

Mr. Everett: I don't like to try lawsuits by stipulations, and if you want to——

Mr. McCabe: We will give you everything we have.

The Court: During the course of your introduction of evidence if a certain document or paper is called for the explanation could be made then. You

may save time because you both called for things that won't be needed very likely.

Mr. McCabe: If I correctly understand the court, as we proceed with the trial after we have found out what records we have or what we haven't——

The Court: You put a witness on the stand and the witness discloses a certain instrument or document necessary, then you can turn to the gentlemen on the other side [189] and say, "Have you produced that?" And then he can give you an explanation and say he hasn't got it and it can't be found.

Mr. McCabe: Of course, by reason of the stipulation made this morning with respect to waiver of objection as to copies of letters, well, of course, we can get those out of the way. We have a witness here available, I could start with the examination.

The Court: You may start in.

Mr. Everett: If I could interpose one thing. The original notice to produce which I served on Mr. McCabe which shows his acceptance of service, I received it the day I left Casper so I haven't had the opportunity to file it with the Clerk and I would like to file it.

The Court: Very well, it may be filed.

Mr. McCabe: If your Honor please, may I examine the witness from here? To examine him from there I would have to holler pretty loud.

The Court: Yes, that is all right.

JEAN P. GERLOUGH

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. McCabe:

Q. What is your name? [190]

A. Jean P. Gerlough.

Q. Where do you reside, Mr. Gerlough?

A. Shelby, Montana.

Q. Do you sustain any position or relation to Inland Empire Oil and Gas Syndicate?

A. I do.

Q. The plaintiff in this action, one of the plaintiffs?

A. I do.

Q. And what is your position?

A. I am a trustee of Inland Empire Oil and Gas Syndicate and also Secretary-Treasurer and General Manager of the Syndicate.

Q. How long have you sustained that position with Inland Oil and Gas Syndicate?

A. I have been a trustee since the organization of the Syndicate in May, 1922.

Q. And how long have you been General Manager of the Syndicate?

A. I have been General Manager since 1926. I have been Secretary of the Syndicate since the beginning in 1922.

Q. Are you acquainted with T. P. Jones?

A. Yes, I am.

Q. And R. E. Wilson? A. Yes.

Q. What, if any, position did those gentlemen hold with the Inland Empire Oil and Gas Syndicate?

(Testimony of Jean P. Gerlough.)

A. Mr. Wilson was President of it, trustee and President of Inland Empire Oil & Gas when formed and Mr. Jones was a [191] trustee of the Syndicate.

Q. And did Mr. Wilson have any managerial position with the Syndicate?

A. Yes, Mr. Wilson was General Manager up until 1926.

Q. And approximately what time of the year of 1926 did he sever his relations as General Manager?

A. In April, 1926.

Q. And Mr. Jones, how long did he hold the position of trustee in the Syndicate?

A. Mr. Jones was a trustee in the Syndicate until 1941.

Q. And do you recall the approximate time of the year of 1941?

A. No, I do not remember the month.

Q. Now, at the time of the institution of the within action who were the trustees of Inland Empire Oil & Gas Syndicate?

A. Mr. G. H. Hornby of Belfry, Idaho; Stanley Hodgman of Missoula, Montana, and myself.

Q. What, if anything, occurred to Mr. Hornby after the action was brought?

A. Mr. Hornby died shortly after the action was started.

Q. And as I recall Mr. Larson was substituted as party plaintiff in this action as a trustee?

A. His position, Mr. Hornby's position on the

(Testimony of Jean P. Gerlough.)

Board was taken; he was replaced by Roy E. Larson of Shelby, Montana. [192]

Q. Since the appointment of Mr. Larson has he and you and Stanley Hodgman continued to be the trustees of that Syndicate? A. We have.

Q. Now with respect to the Potlatch Oil and Refining Company what position have you ever held with that company?

A. I was one of the organizers of the corporation in 1922, I believe it was.

Q. Well, by the organizers do I understand you to be one of the incorporators?

A. One of the incorporators, yes, and stockholder.

Q. What relation did you thereafter sustain to the corporation Potlatch Oil and Refining Company?

A. I was a stockholder all the time, and in 1928 I became a director of the corporation.

Q. Prior to 1928 had you ever been a director of the corporation?

A. I was at the inception of it, yes; at the very beginning, yes, I was a director.

Q. And thereafter you were replaced as a director by some other person? A. Yes.

Q. Who were the other directors of that corporation at that time?

A. Mr. T. P. Jones, K. G. Luke—do you mean, Mr. McCabe in the organization?

Q. Yes, after it was first organized? [193]

A. After it was first organized?

(Testimony of Jean P. Gerlough.)

Q. Yes.

Mr. Everett: May I object to this line of questioning as not the best evidence. Mr. McCabe, I would think the characters and incorporation papers and so forth would be the best.

Mr. McCabe: Of course, the minutes of the meetings would show that, but as I understand that an officer can testify who were officers acting within the corporation. However, I will let the Court rule on the question.

The Court: I think he can testify and you can call for them on cross-examination, I suppose, if you want them to produce them relative to the organizations.

Q. Who were the incorporators of the Potlatch Oil and Refining Company besides yourself?

A. T. P. Jones, K. G. Luke, A. W. Laird, and there was a fifth one I don't recall offhand.

Q. You don't recall, well, we will take care of that later. What other relations have you sustained to Potlatch Oil & Refining Company since its incorporation?

A. I have been a stockholder since the beginning and I have been a director since 1928; I have been Secretary-Treasurer and Manager since 1931.

Q. About what time of the year 1931, approximately?

A. I believe it was April. I couldn't be too sure. [194]

Q. That is your recollection? A. Yes.

Q. With respect to Inland Empire Oil & Gas

(Testimony of Jean P. Gerlough.)

Syndicate have you at any time been interested in it as the owner of certificates of beneficial interests? A. Yes, I have been.

Q. Are you still an owner of certificates of beneficial interests in that Syndicate?

A. I have held stock interest in it from the beginning.

Q. And with respect to Potlatch Oil and Refining Company with reference to holding stock in that company do you hold stock in that company?

A. I also have held stock in that company from the beginning.

Q. And you are still the owner of those certificates and stock? A. That is correct.

Q. Mr. Gerlough, as a trustee of Inland Empire Oil and Gas Syndicate are you able to say who has possession of the records of that Syndicate at the present time? A. I do.

Q. And I believe you stated you also occupied the position of secretary of the Syndicate, is that correct? A. That is correct.

Q. You have been requested by me pursuant to notice to produce—in this case—to produce all of the statements that were rendered by The Ohio Oil Company to the Inland Empire Oil & Gas Syndicate and the Potlatch Oil and Refining Company from the inception of their interests in the agreement, [195] operating agreement which has been admitted by the pleadings to have been entered into. You recall me notifying you I had received this notice to produce? A. Yes.

(Testimony of Jean P. Gerlough.)

Q. Have you produced all those records?

A. I have produced all of the records.

Q. And did I request you to produce then other similar statements that were delivered to the Troy-Sweet Grass Oil Syndicate by the Ohio Oil Company under its operations under the agreement involved in this action? A. Yes.

Q. And have you so produced them?

A. I have.

Q. And did I also request you to produce certain transmittal vouchers which had been requested to be produced by the plaintiffs which accompanied checks from The Ohio Oil Company, did I notify you to produce them? A. Yes, you did.

Q. And did you produce all of those transmittal vouchers which either the Syndicate, plaintiff Syndicate or the plaintiff corporation has?

A. I produced all of them that were available; some had been lost.

Q. Now will you please examine these containers and examine the statement appearing thereon, the white sheet attached to the containers, and state what the records are that are in that container?

A. These are the statements rendered by The Ohio Oil [196] Company to Inland Empire Oil and Gas Syndicate from August, 1922, up until January 31, 1943.

Mr. Everett: Did I understand you to say August 22?

(Testimony of Jean P. Gerlough.)

A. August, 1922. Dated August 31st, 1922, until January 31st, 1943.

Q. And for the purpose of the identification of this container I have marked it here Plaintiffs' Exhibit No. 1. Now please examine this other container which I show to you and upon which appears the typewriting and state whether or not you know what that container contains. Just answer yes or no.

A. Yes, I recognize the container and the statements.

Q. And what does that container contain?

A. This contains the statements from The Ohio Oil Company, statements made to the Potlatch Oil and Refining Company from July 23 to January, 1943.

Q. And for the purpose of identification I am marking this last mentioned container Plaintiffs' Exhibit No. 2. You observe that that container is so marked? A. Yes.

Q. Do these statements contain in the containers marked Plaintiffs' Exhibits 1 and 2, contain all of the statements which to your knowledge which were furnished by The Ohio Oil Company pertaining to operations under the oil and gas leases known as the I. H. Baker or I. Baker lease [197] and I. Sinton lease?

A. These statements in the two boxes here contain all, are all the statements rendered by The Ohio Oil Company to the Inland Empire Oil and Gas Syndicate and the Potlatch Oil and Refining Company.

(Testimony of Jean P. Gerlough.)

Q. Included in these statements which you have just identified and attached and made a part thereof are there some statements or some entries pertaining to operations of this contract, contracts between The Ohio Oil Company and the Potlatch and Inland, respectively? A. Yes, there are.

Mr. Everett: Would you read that last question back?

(Question read.)

Mr. Everett: I don't know whether the witness understands the question; I didn't.

Q. Now, did you understand my question?

A. Yes, there are some statements in there of accounts under the B. Sinton lease and the Oliver O'Hannon lease which are under a separate contract.

Q. And were they fastened together with the other statements which you heretofore testified to?

A. Yes, they are.

Q. And you haven't separated those?

A. Some of them I haven't separated. I separated most of them. [198]

Q. Well those that were loose and not bound?

A. Those that were loose and not bound together and clipped together I separated, yes.

Q. Now, showing you this container containing, with the typewriting on white paper stamped on there, do you know what that container contains?

A. Yes.

Q. Now, what does that container contain?

(Testimony of Jean P. Gerlough.)

A. This container contains all the statements rendered by The Ohio Oil Company to the Potlatch Oil and Refining Company covering the operation of the B. Sinton lease and the O'Hannon lease with the exception of those which couldn't be separated from the other statements.

Q. Now, I will mark that container for identification purposes Plaintiffs' Exhibit 3. Now do you see that identification? A. Yes.

Q. And that container marked Plaintiffs' Exhibit 3 contains the statements concerning which you have just testified? A. Yes.

Q. I show you a white cardboard box with a typewritten statement appearing thereon, do you know what that container contains?

A. Yes, I do.

Q. And what does that container contain?

A. This container contains all the statements rendered by The Ohio Oil Company to the Troy-Sweet Grass Oil Syndicate.

Q. Under its operations under the contract involved in [199] this action?

A. That is right.

Q. Now, I am marking for identification purposes Plaintiffs' Exhibit 4. Now does that Plaintiffs' Exhibit 4 contain the statements to the Troy-Sweet Grass Oil Syndicate from The Ohio Oil Company concerning which you have just testified? A. That is right.

Mr. Everett: I want to suggest to counsel here that he has marked these exhibits for identifica-

(Testimony of Jean P. Gerlough.)

tion 1, 2, 3 and 4, Plaintiffs' Exhibits 1, 2, 3, and 4, and I believe the record shows in connection with the depositions and so forth you already have those same exhibits to other exhibits.

Mr. McCabe: I thought we identified those by initial. Well, we will change these to recite as the identification number on these respective containers Plaintiffs' Exhibit No. A, that is for the statements rendered to the Inland Empire Oil and Gas Syndicate, concerning which you have testified; Plaintiffs' Exhibit B to identify the containers in which you have testified contains all of the statements rendered to the Potlatch Oil and Refining Company by the defendant company; and Plaintiffs' Exhibit C, instead of Plaintiffs' Exhibit 3, we will change that and mark that Plaintiffs' Exhibit C for identification purposes as containing the statements rendered to Potlatch Oil and Refining Company by The Ohio Oil Company embracing the lands in the [200] B. Sinton and O'Hannon oil and gas leases.

A. Correct.

Q. And with respect to the exhibit which we have marked for identification as Plaintiffs' Exhibit No. 4, concerning which you have testified, I am changing that exhibit to Plaintiffs' Exhibit No. D, and you heretofore identified a container with respect to transmittal vouchers accompanying checks issued by The Ohio Oil Company to the Potlatch Oil and Refining Company and Inland Empire Oil and Gas Syndicate, and I hand you

(Testimony of Jean P. Gerlough.)

this container which bears no exhibit mark or identification mark. I am going to mark that Plaintiffs' Exhibit E for identification. Now you observe that that exhibit containing the transmittal vouchers I mentioned is now marked Plaintiffs' Exhibit E for identification? A. Yes.

Mr. McCabe: I now offer in evidence these monthly statements contained in containers marked Plaintiffs' Exhibits A, B, C, D, and E, respectively, conformable to the notice and demand to produce in open court served upon the defendant.

Mr. Everett: We have no objection to the receipt of those in evidence. We would, however, like an opportunity to check them, Mr. McCabe.

The Court: You want to examine them?

Mr. Everett: Yes.

The Court: Very well, we will suspend here. Court [201] will stand in recess until two o'clock this afternoon.

(11:50 o'clock a.m.)

(Court resumed, pursuant to recess, at 2:00 o'clock p.m. on December 22, 1949, at which time all counsel were present.)

The Court: Proceed.

JEAN P. GERLOUGH

resumed the stand and testified as follows:

Direct Examination

(Continued)

By Mr. McCabe:

Q. Mr. Gerlough, are you familiar or did you ever read the operating agreement, the original operating agreement involved in this action?

A. Yes, I have.

Q. And were you present or did you have any part in the negotiations which lead up or which resulted in the making of the operating agreement between the Troy-Sweet Grass Syndicate and The Ohio Oil Company, a copy of which is attached to the complaint of the plaintiffs herein?

A. I had no part in the actual negotiations.

Q. After the contract was signed did you have the contract exhibited to you?

A. Yes, I did.

Q. And did you read same? A. Yes, I did.

Q. Now, after the Ohio Oil Company's statements started [202] to come in against the Inland Empire Oil and Gas Syndicate did you ever in your capacity as trustee discuss with persons purporting to be connected with The Ohio Oil Company objections which you, the Syndicate, felt were proper against charges being made in these statements? A. Yes.

Mr. Everett: We object to that question, your Honor, as wholly incompetent, irrelevant and im-

(Testimony of Jean P. Gerlough.)

material whether he discussed it with anyone; the contract he refers to has not been introduced in evidence.

Mr. McCabe: This testimony is to show the making of objections to these.

The Court: The question here is very general, so generally that we can hardly apply it to any specific thing talking generally or discussing it with somebody generally. I don't know whether it is proper or not. I will let you go a little further. Who did you talk to, what were you talking about and what was the idea of the conversation?

Q. (By Mr. McCabe): Well, are you acquainted with L. J. Yealy? A. Yes, I am.

Q. And with Virgil McCracken?

A. Yes, I am.

Q. Did you ever have any conversations in your capacity as trustee with either of these gentlemen or both of them in connection with charges appearing against the Inland Empire Oil and Gas Syndicate in the statements which were being [203] furnished monthly by The Ohio Oil Company?

A. Yes, I did.

Mr. Everett: It is wholly irrelevant and immaterial whether he had any conversations with Mr. Yealy or Mr. McCracken or anybody else.

The Court: Who are they? Who are Mr. Yealy and Mr. McCracken?

Mr. McCabe: It has been admitted in evidence that they are connected, employees of The Ohio

(Testimony of Jean P. Gerlough.)

Oil Company by stipulation that has been entered in the respective capacities.

Mr. Everett: Let's see the stipulation, Mr. McCabe, you refer to.

Mr. McCabe: It is in answer to those interrogatories which I submitted.

Mr. Everett: The stipulation he refers to, your Honor, is a stipulation dated October 21, 1949, in which it is stipulated that Mr. Yealy was a General Superintendent, Shelby, Montana, and Mr. McCracken was Cashier of the Shelby office. Mr. Yealy from September, 1922, to March, 1938, and McCracken from January 1st, 1923, to December 9th, 1936. And not laying proper foundation for the question or the testimony even under this stipulation in that he has shown no place that Mr. Yealy or Mr. McCracken had an official position sufficient to bind the company by anything they might have said and we think our objection is good on that ground. [204]

Mr. McCabe: Well, if the Court please, the purpose of this was to show these were the only two agents of The Ohio Oil Company in that area.

The Court: Have you shown that?

Mr. McCabe: I will. I just got out of order, your Honor. I will lay the foundation.

Q. Mr. Gerlough, who were the persons representing The Ohio Oil Company in the area of the lands embraced in the Troy-Sweet Grass Oil Syndicate-Ohio Oil Company operating agreement of July, 1922, or June 15th, 1922?

(Testimony of Jean P. Gerlough.)

Mr. Everett: We object to the question; it calls for a conclusion of the witness; not shown they were executive officers of the company in any event.

Mr. McCabe: The purpose of that is they were purporting to act.

The Court: Well, he has had dealings with them and had conversation with them and been in the office, he knows them. I will let him answer how he dealt with them as General Manager or Cashier or if he knew them as such; they weren't complete strangers to him.

Q. Mr. Gerlough, do you know whether L. J. Yealy was representing The Ohio Oil Company in any capacity in the area of the lands involved in the operating agreement involved in this action?

A. Yes, he was.

Q. And who else—do you know whether Virgil McCracken [205] was representing The Ohio Oil Company in any capacity in that same area?

A. Yes, he was. Mr. Yealy was General Superintendent for The Ohio Oil Company and Mr. McCracken was The Ohio Oil Company Cashier in the Shelby office.

Q. Now, do you know whether these persons were actively in charge of the operations of The Ohio Oil Company in that area at the time?

A. Mr. Yealy was in charge of the field operations, I know that. I don't know what Mr. McCracken's capacity was so far as being official; he was a Cashier in the office there.

Q. Well, were these two men the only men in

(Testimony of Jean P. Gerlough.)

charge of the affairs of The Ohio Oil Company in that area at the time?

Mr. Everett: We object to that question.

Mr. McCabe: I will lay the foundation.

The Court: Yes.

Q. Do you know, Mr. Gerlough, whether these two gentlemen, Mr. Yealy and Mr. McCracken, were or were not the only persons representing The Ohio Oil Company's operations in that area?

Mr. Everett: We object to the question again. I don't know what the purpose is of what you are trying to bring out here, counsel, and I wouldn't attempt to tell you how to do it if it could be [206] done.

The Court: Well, you can ask him if he knows of any other officers in charge or operating there. It is hardly possible he would know whether some other officer of The Ohio Oil Company was in charge and really had authority over these two men you just referred to. I don't see how he could know that.

Q. Do you know, Mr. Gerlough, whether Mr. McCracken and Mr. L. J. Yealy were in charge of the operations of the Ohio Oil Company in that area at the time?

A. I know Mr. Yealy was in charge. As I said, I don't know what Mr. McCracken's official capacity was. They were both residents there and officials of The Ohio Oil Company in Shelby.

Mr. Everett: I object and ask that the answer be stricken as a conclusion that they were officials

(Testimony of Jean P. Gerlough.)

of The Ohio Oil Company; it has not been shown.

The Court: Yes. Well, he dealt with them as such and I will let that part of it stand; whether he knows what officials they were it is another thing. It is hard to establish on the foundation laid for it.

The Court: You dealt with them as officials of the Company?

A. That is right.

The Court: In the capacity in which you just stated?

A. That is right. [207]

The Court: All right, that will stand.

Q. (By Mr. McCabe): Did you then after the statements were being furnished by The Ohio Oil Company as to expenditures under the operating agreement involved in this action to Inland Empire Oil and Gas Syndicate concerning matters of which, matters of proper charges appearing or improper charges appearing in the statements?

Mr. Everett: We object to the statement, your Honor. He has not shown that these men had charge of the accounts or anything with reference to the accounts.

The Court: I will sustain the objection. No need to go any further, I will sustain the objection.

Mr. McCabe: You sustain the objection?

The Court: Yes.

Q. Were there—do you know whether there were any other persons in the area of the lands involved in this contract having charge of operations of The Ohio Oil Company?

(Testimony of Jean P. Gerlough.)

Mr. Everett: I object to that question as being leading.

The Court: Well, I think we have pretty well gone into that point. We are getting right back where we were a few minutes ago, whether he knows whether anybody else had any charge or authority there.

Mr. McCabe: That is not the question I [208] asked, your Honor.

The Court: Ask him if he knows whether any other officer had charge or authority there over these two officers he mentioned.

Q. Were there, or do you know whether there were any officers or agents of The Ohio Oil Company located in the area where these operations of The Ohio Oil Company under the operating agreement involved in this action in that area over Mr. McCracken and Mr. Yealy holding position superior?

Mr. Everett: I object. It calls for a conclusion of the witness whether there were officers and agents.

The Court: I will let him answer.

A. There were no resident agents I know of.

The Court: Do you know? Just answer his question yes or no.

A. No.

Q. (By Mr. McCabe): Do you know or don't you know? A. No.

The Court: He says, no, he doesn't.

Q. (By Mr. McCabe): Well, Mr. Gerlough,

(Testimony of Jean P. Gerlough.)

have you personally examined the statements which are contained in the containers marked Plaintiffs' Exhibits A, B, C, and D? A. Yes, I have.

Q. Did you ever examine these statements item by item? A. Yes, I have. [209]

Q. And from those statements did you draw a summary statement of charges or items which Inland Empire Oil and Gas Syndicate considered improper under the operating agreement?

A. Yes, I did.

Mr. Everett: We object to that, your Honor. It is wholly irrelevant and immaterial what he drew under those statements. They introduced the statements; they speak for themselves. Anything he made from them is wholly immaterial and improper testimony.

The Court: I think I will have to sustain the objection.

Mr. Everett: The Court sustained my objection on that, Mr. McCabe.

Mr. McCabe: Yes, I know.

Q. Mr. Gerlough, besides your connection with the Potlatch Oil and Refining Company and the Inland Empire Oil and Gas Syndicate, do you have any other occupation?

A. Yes, sir, I am a petroleum geologist.

Q. And where have you been residing since 1921, since the year 1921? A. At Shelby, Montana.

Q. Have you ever been engaged in the drilling of oil wells in the area of the lands embraced in the operating agreement in this case?

(Testimony of Jean P. Gerlough.)

A. Yes, I have.

Mr. Everett: We think that question is improper and that the answer should be stricken as wholly irrelevant [210] and immaterial whether he has been engaged in operations.

The Court: He probably is laying a foundation for something more to come. Overrule the objection.

Q. (By Mr. McCabe): What was your answer?

A. Yes, I have.

Q. And how many years' actual experience have you had in drilling and operating oil wells in that area? A. Oh, about 25 years.

Q. Were you ever employed by the Shoshoni Oil Company? A. Yes, I was.

Q. What was your capacity with that company?

A. Field superintendent.

Mr. Everett: What is the purpose of this line of testimony, Mr. McCabe?

Mr. McCabe: These questions and foundation will qualify the witness to testify further, first, to the price of oil in the area at the times when the Ohio Oil Company was operating these properties and making payments to these people to sustain the proposition we were not properly credited with sales or production at the prevailing market price in the area in which the oil wells drilled and operated by the Ohio Oil Company under this operating agreement were located.

Mr. Everett: Well, I would think the whole thing was improper, your Honor, the foundation and the questions [211] that follow. It seems to me

(Testimony of Jean P. Gerlough.)

in the first place that would probably be considered an accounting matter, if there was to be an accounting, and, in the second place, it is wholly irrelevant to any issue in the case, and I can't see the point of taking up our time with a matter of that sort.

The Court: You now have it in the case. You now have that meeting at Shelby back in—when was it, 1925? No—1925, yes. And some of the representatives of the Ohio Oil Company and some of the representatives of these others, the plaintiffs here, with Mr. Freeman, I believe, as attorney, you had a confab there and Mr. Freeman was instructed to come back and submit all your complaints in writing and the Ohio Oil Company were to respond and submit in writing their answers to all of these complaints. Now haven't you got that here, and isn't that in the record so that we know what the prices were and what admissions were made, or the Ohio Oil Company made some admissions about prices and so forth and explained them? Is there anything further you have to go into on that subject?

Mr. McCabe: As I understand the rule in obtaining an accounting we have to show a *prima facie* case of a violation of the agreement. That is not binding on the accounting, the question, whether or not those charges were a violation or not is determined upon the accounting, but we have to show that the defendant as a tenant in common or as trustee or as [212] a joint adventurer was violating

(Testimony of Jean P. Gerlough.)

the contract; we have to at least make a prima facie case of that.

The Court: Don't you have to show time and place and circumstances and what the conditions were? Can you generally inquire as to overcharges without applying them to some time, place and circumstance?

Mr. McCabe: I was just leading up to that, your Honor. He has the record and he is going to testify from the record he made at that time, from his reference setting forth the prices the producer was paid, and setting forth the prices other purchasers were paying for oil in the field, and these other purchasers were paying a higher price from certain producers than the Ohio Oil Company was giving these people as credit, and the Ohio Oil Company was taking all the oil under this agreement, so we are laying the foundation now to show that during the certain period of time that the Ohio already was claimed by the company to have done these things, but they actually were not paying in accordance with the prevailing market prices.

Mr. Everett: We still insist upon our objection.

The Court: I will let him go ahead.

Mr. Everett: The testimony is in here, your Honor, by his own exhibit that at that time or subsequent to that time they received monthly remittances from us with statement of account paid in full. Now how they can open that up and [213] violate all the rules of parol testimony and everything else, I don't know. Here, I turn to some of

(Testimony of Jean P. Gerlough.)

these statements. They run on here—I don't believe—but for example, on July 23rd, 1924, referring to transmittal slip for the Plaintiffs' Exhibit E; it is addressed to Inland Empire Oil & Gas Syndicate, No. 1264, The Ohio Oil Company, Findlay, Ohio, July 23rd, 1924, in full settlement for the amount due you for the net earnings of your part interest holdings as per our bill W-3927, dated June 30th, 1924. Then we will turn to another one; they are all about the same. We come down here and showing payment of \$786.48. Then we come down to March——

The Court: In full settlement?

Mr. Everett: Yes, sir. Then we come to March 30th, 1926, and to another one of the transmittal slips, which accompany the check for the payment, as he has already testified, addressed to Inland Empire Oil and Gas Syndicate, Shelby, Montana, dated March 30, 1926, and states: "In full settlement of our bill W-211-26, in the amount of \$1,265.01." I am just picking these out at random. There is every month—about the only difference is some say in full settlement and some say in payment of our bill and so and so, and all giving the amounts. Down to January 23rd, 1932, another transmittal slip, addressed to Inland Empire Oil and Gas Company, Shelby, Montana. The Ohio Oil Company, Findlay, Ohio, January 23rd, 1932, in payment of our credit bill No. W-21-32, dated [214] December 31st, 1931, \$1,060.36. And all of them are preceded by the printed statement, the ones I have read were typed

(Testimony of Jean P. Gerlough.)

on, and the printed statement "For payment of following items," "No receipt required." That is printed on each one of these.

Mr. McCabe: Taking those statements by themselves, your Honor, and the statements speak for themselves, it would appear that was a settlement, but the evidence already introduced by these depositions shows that there was objections made to the correctness of these bills and the company promised to correct them and rectify the mistakes, and the record will show in many cases all through these statements the company made credits and corrections on the statements, thereby showing that they never intended these payments as being final settlement and final payments of the respective bills. In other words, the question of accounts stated. That is, evidence is of accounts stated.

The Court: Now go ahead under counsel's objection and get out what you want from him and we will see when we get all the case in under counsel's objections. You are making a record of that and we will pass on it later.

Mr. McCabe: The purpose of this line of examination——

The Court: Get down and do it as quick as you can.

Mr. McCabe: If it please the court, the time, place and circumstances and what he has to say about the price; what he has to say about the price being in excess, a violation of [215] the contract?

(Testimony of Jean P. Gerlough.)

The Court: If you think you can show that by this witness.

Mr. McCabe: Yes.

Q. (By Mr. McCabe): Mr. Gerlough, as a trustee or did you ever during the years that you were acting and operating for oil and gas in the area where these lands are located keep in touch with the market prices being paid by producers of oil in that area? A. I did.

Q. Now during the years 1924 to and including the years, all of the years of 1928, were you familiar and did you determine what prices were being paid by the various purchasers of oil in the area where the lands involved in this action and in the operating agreement were located? A. Yes, I did.

Mr. Everett: May it please the Court, our objections go to all of this?

The Court: Oh, yes, certainly.

Q. (By Mr. McCabe): What was your answer?

A. Yes, I did.

Q. And during that time did you keep a record of the prices that were being paid by The Ohio Oil Company to the Inland Empire Oil & Gas Syndicate and to the Potlatch Oil and Refining Company for purchases of crude oil being made by them?

A. Yes, I did. [216]

Q. And did you also during that time keep the record of the prices that were being paid by other purchasers of oil in that area during that same period of time? A. Yes, I did.

Q. Are you able to state at this time what prices

(Testimony of Jean P. Gerlough.)

were being paid by The Ohio Oil Company to the Potlatch Oil and Refining Company and to the Inland Empire Oil and Gas Syndicate and also what prices were being paid by other purchasers of oil in the area? A. Yes, I can.

Q. During the same period of time?

A. Yes, I can. I have a memorandum if you will allow me to consult it.

Mr. Everett: Can I ask him a question just a minute?

Q. (By Mr. Everett): Are you familiar with the signature of Mr. T. P. Jones?

A. Yes, I am.

Q. J. A. Harsh? A. Yes.

Mr. Everett: Referring to a division order dated August 3rd, 1923, addressed to The Ohio Oil Company, signed Troy Sweet Grass Oil Syndicate, by T. P. Jones, President, and signed Potlatch Oil and Refining Company, by T. P. Jones, President, by J. A. Harsh, Secretary and Treasurer. I call the Court's attention that this division order provides: First: That the oil run in pursuance of this division order [217] shall be paid for to the well owners or their assigns in proportion to their respective interests shown above, at the market price paid by The Ohio Oil Company for the same kind and quality of oil on the date of its receipt." I ask you to mark this as Defendant's Exhibit 1 and introduce the same in evidence in connection with the cross-examination of this witness. (Defendant's Exhibit K.)

Mr. McCabe: Of course, we object on the grounds this exhibit——

(Testimony of Jean P. Gerlough.)

The Court: How long does that division order continue? That is in 1923 and the matters submitted here or to be submitted by this witness would run from 1924 to 1928. Would that order be in force in 1924?

Mr. Everett: This order is in force for whatever periods of time The Ohio Oil Company is running oil from the lease.

Mr. McCabe: That is a matter of evidence in defense.

Mr. Everett: Your statements show we were running oil for you and accounting for oil produced and sold up to the time we sold the lease.

Mr. McCabe: Well, that doesn't show that in the agreement.

The Court: No, it doesn't show it in your objection.

Mr. McCabe: I object on the ground it is not within the issues and cross-examination. [218]

The Court: Within the period of time this witness is being questioned, 1924 to 1928?

Mr. Everett: This order was given in 1923, your Honor, and it has never been revoked.

Mr. McCabe: Well, that is a matter of evidence.

Mr. Everett: You prove it was revoked, Mr. McCabe, and you can't.

The Court: Suppose you hold that until you come to your part of the case; then you can show what the import of the order is.

Mr. Everett: I would like to make the further

(Testimony of Jean P. Gerlough.)

objection this testimony is improper as violating the parol evidence rule.

The Court: If it is, you have an objection to all this line of testimony and the Court is receiving it to see what he has got.

Q. (By Mr. McCabe): Now, have you such a record with you? A. Yes, I have.

Q. Will you please produce it? Have you the record with you? A. Yes, I have.

Q. Now, when this record that you have there was made, were these facts fresh in your memory?

A. Yes, they were.

Q. And does that record correctly and truthfully set forth the prices of oil being paid by The Ohio Oil Company [219] to the Potlatch Oil and Refining Company and the Inland Empire Oil and Gas Syndicate and the prices being paid by other purchasers of oil in that area during the period of time which the record purports to cover and which you have testified to? A. Yes, it does.

Mr. Everett: May the Court please, I don't like to interrupt, but if he would quit asking leading questions and let the witness testify, it would facilitate this matter. It calls for a conclusion of the witness. He laid no foundation where these prices were taken from and what from, and here is the evidence showing the prices.

The Court: I will sustain the objection. It is leading, all right. You will have to put it a little differently in order to prove these continued in force, otherwise——

(Testimony of Jean P. Gerlough.)

Mr. McCabe: Your Honor, I started out to show this——

The Court: Go on, sit down, and ask the questions. Don't just ask leading questions.

Mr. McCabe: This last question is permissible to the witness?

Mr. Everett: He sustained my objection to it, Mr. McCabe.

The Court: You could reframe your question.

Q. By use of your record are you able to refresh your [220] memory as to the prices of oil during the period which you have testified concerning? A. Yes, I can.

Q. Now, please refresh your memory from that record and just tell us during the periods of time from 1924 to 1928 the prices which were being paid by The Ohio Oil Company to the Inland Empire Oil and Gas Syndicate and to the Potlatch Oil and Refining Company and the prices which were being paid by other purchasers in the same area?

Mr. Everett: Let's take them one at a time.

Mr. McCabe: All right.

Q. Are you able from that record to refresh your recollection and testify as to the prices being paid to the Potlatch Oil and Refining Company during the period of time which you said you kept the record? A. Yes.

Q. And from that record are you able to testify from refreshing your recollection with it as to the price that was paid during the time set forth in the

(Testimony of Jean P. Gerlough.)

record of which it purports to be a record being paid to the Potlatch Oil and Refining Company?

A. Yes.

Q. Does that record also, or refreshing your recollection are you able to testify from that record as to what price the purchasers of oil in that area were generally paying on the market for oil to producers of the oil?

A. Yes.

Mr. Everett: No proper foundation has been laid [221] for any of this, your Honor. It is not the best evidence what is paid in the area and what lease it was from, and it just isn't tied down. I am really sorry I have to object, but I am going to try this case.

The Court: He hasn't tied in the testimony. It is just a general floating proposition. You have to get down to some concrete facts somewhere. They paid a certain amount and then compare the price with what the defendant paid that same time and the same quality of oil.

Mr. McCabe: I was going to get up to that.

The Court: You have a lot of ground to cover. His objection is good at the present moment.

Q. Refreshing your recollection, please state what price was being paid by The Ohio Oil Company to the Baker company during the various periods between 1924 and 1928 concerning which you said you were familiar with the prices being paid for oil?

A. Yes. From the end of July, 1924, until the 23rd of January, 1925, The Ohio Oil Company was

(Testimony of Jean P. Gerlough.)

paying 90 cents a barrel for crude oil run from leases under this contract in dispute. The International Refining Company during the same period was paying \$1.02½ a barrel.

Mr. Everett: Would the witness also state the quantities or what was involved in that computation?

A. I have them down here. [222]

Mr. Everett: While he is looking it up, I understand our objections go to all of this, of course?

The Court: Yes.

A. These are all here for months, Mr. Everett. From July 18 to July 27th, 2,061.42 sold International Refining Company. They paid \$2,112.96. From July 29th through August 7th, 790.63 barrels, paid \$810.40.

Q. Would you state the price per barrel?

A. The price per barrel all through here is \$1.02½. From August 17th, 613.66 barrels, paid \$629.01.

Mr. Everett: Who paid?

A. International Refining Company paid Shoshoni Oil Company. From August 18th through August 19th, 720.16, paid \$738.17.

Q. (By Mr. McCabe): How much a barrel?

A. \$1.02½ a barrel. From August 20th through August 31st, 12,703.08 barrels, paid \$13,020.66.

Q. How much a barrel?

A. \$1.02½ a barrel. From September 1st, 1924, to September 15, 1924, 16,156.01, at \$1.02½ a barrel, paid——

(Testimony of Jean P. Gerlough.)

Q. What price?

A. \$1.02 $\frac{1}{2}$. Paid \$16,559.92. September 16th, 1924, through September 30th, 1924, 14,186.72, at \$1.02 $\frac{1}{2}$, paid \$14,541.39. October 1st, 1924, through October 15th, 1924, [223] \$9,973.10, at \$1.02 $\frac{1}{2}$ a barrel, paid \$10,222.45.

Q. These figures are all figures paid by the International Refinery; is that right?

A. Paid by International Refining Company to the Potlatch Oil Company for oil run through the Illinois Pipe Line to the International Refining Company.

Q. I am going to ask you, was all this Baker oil from lands embraced in this operating agreement put through the Illinois Pipe Line?

A. Yes, it was. From October 16th, 1924, to October 31st, 1924, 7,702.51, at \$1.02 $\frac{1}{2}$, paid \$7,895.07.

Q. What price per barrel?

A. \$1.02 $\frac{1}{2}$ per barrel.

Mr. Everett: Could I interrupt? Do you have the total production?

A. No, I haven't.

Mr. Everett: From the field at that time?

A. Total production in the field?

Mr. Everett: Total produced and sold from the field during these periods?

A. No, I don't have the total.

November 1st, 1924, through November 15th, 1924, 4,430.68 at \$1.02 $\frac{1}{2}$, \$4,541.44.

(Testimony of Jean P. Gerlough.)

Q. (By Mr. McCabe): I wish you would please state how much a barrel. [224]

A. \$1.02½ a barrel. November 26, 1944, through November 30, 1944, at \$1.02 a barrel, 8,521.79, brought \$8,736.88. December 1st, 1924, to December 15th, 1924, 6,279.20, at \$1.02½ a barrel, brought \$6,436.18. December 16th, 1924, until December 31, 1934, at \$1.02, 3,464.37 barrels, brought \$3,550.97. January 2nd, 1925, until January 15th, 1924, 6,561.77, at \$1.02½ a barrel, brought \$6,726.82.

The Court: Are you going on with these figures into 1928?

Mr. McCabe: If your Honor please,—

The Court: Are you going to string this along until 1928; are you?

Mr. McCabe: The price varied.

The Court: May we have an understanding that you submit this and go into the record with his testimony under objection of counsel and not have him reading it through here? It will take an hour to get through this.

Mr. McCabe: Well, we could get finished shortly by having him testify during what period of time International was paying so much a barrel for crude oil of a certain character and quality as that produced from the Baker lease or under the contract and during the periods of time what the Ohio Oil were paying to the Potlatch and Inland.

Mr. Everett: I think we could shorten it, your Honor, if counsel wants to let me take the witness on [225] cross-examination for a few minutes. I

(Testimony of Jean P. Gerlough.)

think I can show this is wholly irrelevant and immaterial what that business is. He is quoting the quantity of oil sold. There is no testimony the quality is the same or what the total production from the field is. Mr. McCabe's testimony is we did not account at the prevailing market price, and I think we can show from this witness they had a special contract which was a special consideration moving between the Shoshoni Oil Company, which maybe had 100 barrels a day production, and the International Refining, and they made special contracts with others and their contracts called for a price of ten cents above the price posted in the field by The Ohio Oil Company.

The Court: That isn't the going price in the field at all?

Mr. Everett: No, the going price is the prevailing price in the contract at which we could——

Mr. McCabe: I will show this price was paid not only to Shoshoni Oil Company, but all others.

The Court: Go on and get through as soon as you can.

The Witness: You want me to read all these?

Mr. McCabe: How did you say you would be willing to have this testimony go in under?

Mr. Everett: I won't stipulate on it, Mr. McCabe. I am not trying to make a case for you; I do not think you have one. [226]

Mr. McCabe: I am not asking you to make a case for me. I have my own case.

Q. (By Mr. McCabe): Go ahead and read it.

(Testimony of Jean P. Gerlough.)

A. From January 16th to January 23, 3,345.19, at 1.02½, \$3,428.81.

The Court: I understand this is all International Refining Company's purchases?

Mr. McCabe: This is all to the International Refining.

The Court: Everything he reads is International Refining Company purchases?

Mr. McCabe: Yes.

The Court: All right.

A. January 23rd to January 31st, 2,598.35, at 1.17½, \$3,053.06. On January 31st, 400 barrels, \$1.24½, \$498.00.

Q. And the same price, 1.17½?

A. \$1.24½. The price is changing every few days here. From January 31st to February 13th, or 15th.

Mr. Everett: Could I interrupt, your Honor, to try to save some time? Do you have the contract with the Shoshoni Oil Company and the International Refining?

A. I don't have it here, no.

Mr. Everett: Where is the contract? Is it available to you, sir? [227]

A. I am not so sure. I have my figures here but I am not sure I have it here.

Q. (By Mr. Everett): Do you know of your own knowledge whether it states that Shoshoni Oil Company, for example, is to receive a premium of ten cents a barrel above the prevailing market price?

A. I don't recall whether it did or not, Mr.

(Testimony of Jean P. Gerlough.)

Everett. I got these here, the prices being paid to all the operators in the Shoshoni pool at the time, not only Shoshoni but other operators by International Refining Company.

Q. Do you know of your own knowledge those sales to the International Refining Company were ten cents above the posted field price posted by the Ohio Company?

A. The prices paid varied according to the prices paid by the Ohio Oil Company, but up to this time you can see it is $12\frac{1}{2}$ above the price posted by the Ohio Oil Company, and it continued that way until September 8th, 1926, when after that time the price was 10 cents above the price posted by the Ohio Oil Company.

Q. Well, as a matter of fact the Ohio posted the field price?

A. They posted there on the field price.

Q. What was that posted price; meaning the price they [228] were willing to pay for oil they purchased?

A. That is the price they pay for oil they produced and they purchased but other purchasers had a price of their own.

Q. What other purchasers were there?

A. International Refining Company at Sunburst, and the Montana Giant at Kevin.

Q. And what were their total sales from the field both to the Ohio and International and the other company you mentioned?

A. Those figures I found here.

(Testimony of Jean P. Gerlough.)

Q. Do you have any idea what the total production was from the field during these periods? What is your basic recollection, was it 25,000 barrels a day?

A. I hardly think it was quite that because in 1926 when the east pool was brought in, the highest production we had in the field was 34,000 barrels a day. I would say offhand perhaps 20,000 barrels.

Q. During what period?

A. The period we are talking about now.

Q. The period 1924-1926? A. Yes.

Q. And the total sales to others than the Ohio Oil Company, what would be your testimony with reference to that? You testified with reference to the ones of International Refining Company giving them by periods in barrels [229] speaking comparatively how would that compare with the total oil sold in the field?

A. You mean the oil produced from the Shoshoni Oil Company?

Q. No, the oil purchased by International Oil Company in the field as compared with oil purchased by the Ohio Oil Company in the field?

A. I would say the International was purchasing just as much oil or maybe more than the Ohio Oil Company at that time.

Q. What was the last figure there you read for that period?

Mr. McCabe: Your Honor, I object to counsel coming in and interfering with the presentation

(Testimony of Jean P. Gerlough.)

of this case. Now he is going in to matters of cross-examination and I ask I be permitted to show.

The Court: Yes, he found a way of shortening it and you are getting along as lawyers often do.

Mr. McCabe: If he can shorten it, okay.

Mr. Everett: I still think I could shorten it but I don't want to interfere with his case.

The Court: I tried to shorten it but I evidently couldn't do it.

The Witness: February 1st to February 15th, 4,485.68, and variable prices. It varied from price of \$1.32½ a [230] barrel, \$5,648.01.

Q. (By Mr. McCabe): What was that price?

A. The price was changing. It was \$1.32½ a barrel at the end of that period. This is a split period. The price just prior to that was \$1.24½ a barrel. At the end of the period it was \$1.32½ a barrel. The price was changing every few days at that time. February 16th to February 28th, 3,901.60 barrels at, partly at \$1.32½, 5,169.62. From March 1st through March 6th, 1,985.04, 1.32½, \$2,630.17. March 7th through March 15th, 1.52½, 2,571.03 brought \$3,920.82. March 17th to March 31st, 4,189.51, at \$1.52½, \$6,389.00.

The Court: You know, it seems to me we are going into something here, if this isn't part of an accounting that would have to be made up hereafter after we reached the accounting stage. It seems to me you are doing an accounting right now.

Mr. McCabe: Well, I thought we could shorten it up but Mr. Everett objected to it by specifying.

(Testimony of Jean P. Gerlough.)

The Court: If you are going to follow this up, we are in an accounting right here, a thing we said we wouldn't do until we passed on all these other questions.

Mr. McCabe: That is all right, your Honor, I will confine my examination along those lines. [231]

The Court: Well, we will do that. This is something that belongs to an accounting. So proceed along another line and let's see where we get. I want to see some of these questions out of the way and then we will know whether we are ever going to have an accounting or not.

Q. (By Mr. McCabe): Mr. Gerlough, in the statements concerning which you testified this morning and contained in Plaintiffs' Exhibits Nos. A, B, C and D, do those statements show over the entire period of that time credits that were included and prior debits in the previous months?

A. Yes, they do.

Q. And these credits were given by the Ohio Oil Company in their statements?

A. That is correct.

Q. Mr. Gerlough, it was admitted in the pleadings in this case that the Ohio Oil Company sometime prior to 1943 assigned and sold their interest in the operating agreement involved in this action to the Texas Company. At the time, any time prior to that sale or at the time of the sale or at any time thereafter, did the Ohio Oil Company notify or inform either the Potlatch Oil and Refining Company or the Inland Empire Oil and Gas Syndi-

(Testimony of Jean P. Gerlough.)

cate of its intention to sell or the fact that it had sold? A. It did not.

Mr. Everett: We object to that, your Honor. It is [232] wholly immaterial. He is not laying any foundation for it. What is the purpose of the question? I don't see it myself. There is nothing in here to say we had to ask them or notify them or anything.

Mr. McCabe: The purpose is very clear and the evidence shows throughout here upon depositions admitted that the objections were being made all the times to certain charges and they were promised a final accounting at the termination of the contract or sometime prior thereto. And without giving such final accounting according to this evidence they immediately transferred all of their interest in the property indicating and tending to show that they were attempting to eliminate that final accounting and attempting to eliminate the people, the Troy-Sweet Grass Syndicate and the Potlatch Oil Company and Inland people from knowing that they were making the deal so they could come in and object to such a transfer.

The Court: Well, of course, there isn't anything now that warrants any argument of that kind but the question and answer may stand as it is and subject to your cross-examination.

A. They did not so notify us.

Q. Now on or about the year 1926 or 1927, did the trustees of the Syndicate Oil Company meet?

A. Yes.

(Testimony of Jean P. Gerlough.)

Mr. Everett: We object. If they met, produce the [233] minutes of the meeting, Mr. McCabe. Let's use the best evidence here.

Mr. McCabe: That is the purpose of that will be to show Mr. Jones testified, if your Honor please, that he had a discussion with Mr. McFayden, the General Division Manager of the Ohio Oil Company, concerning the objections on improper charges that had been theretofore taken up in writing with the Ohio Oil Company, and other objections that had been made, and Mr. McFayden promised if he didn't bring suit, then they would have a final accounting on all of these errors, not only the items objected to but any errors in the charges made would be rectified.

The Court: Was that in 1925 when they had the meeting?

Mr. McCabe: 1926 or 1927 after they had this correspondence back and forth between the companies.

The Court: After they had the previous meeting in Shelby in 1925 when Mr. Freeman was interested in it?

Mr. McCabe: Exactly.

Mr. Everett: We further object to counsel's statement. Mr. McFayden has been dead several years and any oral conversation had with him that would tend to vary, alter, modify or contradict the express terms of the written agreement would be clearly inadmissible. And in addition the record shows that Mr. McFayden is dead and any [234]

(Testimony of Jean P. Gerlough.)

conversations had with him as an agent of the Ohio Oil Company are further incompetent under the statutes of Montana and any testimony of this witness with respect to that matter or any minutes of meeting in connection with any verbal conversations are inadmissible.

Mr. McCabe: And for the further reason this evidence is admissible, your Honor. We are charged or the defense in here is made of the statute of limitations and laches. This evidence will go to explain periods of delay why they didn't bring the suit until 1946 or 1947. The complaint was filed under the rule that where a party leads a person to believe that the matter in controversy would be settled later the statute of limitations and laches does not apply; they are estopped to urge those two defenses.

The Court: It seems to me, gentlemen, it is a proposition of law that is good.

Mr. McCabe: It seems to be the law as we found it, your Honor.

The Court: Well, we will let it stand and find out later on whether it is the law or not. I think at the present moment my impression is that is the law with regard to the use of language of a dead person to alter the effect of some written instrument, to vary the terms of it.

Mr. Everett: Would the court like to hear the statement in the Jones deposition to which we already objected? [235]

The Court: We will try to go along as orderly

(Testimony of Jean P. Gerlough.)

as we can and take these things up consecutively. You will get mixed up here.

Mr. Everett: All right.

The Court: You make your record as briefly as you can subject to counsel's objections and we will determine what the law is later on but I think he has given it correctly. That is my recollection.

Mr. McCabe: Read the question

(Question read.)

Q. Now on or about the year 1926 or 1927, did the trustees of the Syndicate Oil Company meet?

A. Yes, they did.

Q. And at that meeting were all the trustees of the Syndicate present? A. Yes, they were.

Q. Did Mr. Jones make any statement to the trustees present relative to having had a conversation with Mr. McFayden, Division Manager of the Ohio Oil Company?

Mr. Everett: We object to that. That is purely hearsay, nothing more or less. It is not the best evidence. The record of the meeting would be the best evidence.

Mr. McCabe: The counsel has stated he pleaded limitation and laches and this goes to explain the reason for the delay that these men, also trustees, were informed by Mr. Jones of this conversation and what Mr. McFayden said at the time. [236]

Mr. Everett: Mr. McFayden is dead.

Mr. McCabe: But this is not within the exclu-

(Testimony of Jean P. Gerlough.)

sion of the statute. If counsel will read the statute, you will find that relates only——

The Court: All right, make your record under objection of counsel.

Mr. McCabe: Read the question.

(Question read.)

Q. Did Mr. Jones make any statement to the trustees present relative to having had a conversation with Mr. McFayden, Division Manager of the Ohio Oil Company? A. Yes, he did.

Q. And what did he say to you substantially was the substance of the conversation he had with Mr. McFayden?

The Court: That is clearly in violation of the hearsay rule.

Mr. Everett: It is in violation of every rule I ever heard of.

Mr. McCabe: Ordinarily that is true, your Honor, but the authorities says where a person receives information from another source based upon a fact in actual existence, your Honor, that is the conversation between Jones and McFayden that the admissibility as reflecting on the question whether the trustees were guilty of negligence or lack of diligence in maintaining the suit, and that is the authorities which we have found on it. [237]

The Court: You can show by this witness under objection of counsel, of course, that some reference was made to this matter without saying what it was and you will have to rely upon Jones' answer.

(Testimony of Jean P. Gerlough.)

Jones has come out and testified as to his conversation with Mr. McFayden. Now all you can prove by him is there was such a conversation. I am not going to let you. I think it is a direct violation of the hearsay rule.

Q. Have you read the deposition of T. P. Jones in this case? A. Yes, I have.

Q. Do you recall in that deposition——

The Court: Make him repeat what the language was and I said you could do it. Ask him if he recalls the conversation in which this matter came up as he observed from the deposition of Jones and then drop it. I am not going to let you go into that conversation.

Q. Do you recall at this meeting seeing the matter of the conversation which Mr. Jones testified in his deposition with Mr. McFayden came up at that meeting? A. Yes.

Mr. Everett: He is asking the same thing again, your Honor. Let's read what Mr. Jones said. It is clearly inadmissible. It is under the deadman's statute. Now how can he get it in here under violation of the statute? [238]

The Court: Inquire whether or not there was a conversation. A. Yes, there was.

The Court: And in this particular meeting?

A. Yes.

The Court: There was a conversation?

A. Yes.

The Court: In which Jones told you something about a conversation with Mr. McFayden?

(Testimony of Jean P. Gerlough.)

A. Yes.

The Court: All right, drop it there.

Mr. McCabe: Through.

Q. (By Mr. McCabe): Mr. Gerlough, has The Ohio Oil Company ever offered to make a final accounting to the Potlatch Oil and Refining Company concerning its operations under the contract?

Mr. Everett: We object to the question, your Honor, irrelevant and immaterial whether we have offered.

The Court: Ask him if he knows whether such an arrangement was made?

Q. Mr. Gerlough, do you know whether or not The Ohio Oil Company has ever at any time since these various objections concerning which Mr. Jones' deposition refers to made any offer of a final accounting and settlement to the Inland Empire Oil and Gas Company? A. No. [239]

Q. Or did they ever make such offer to the Potlatch Oil and Refining Company?

Mr. Everett: Wait a minute, if you will, before you answer these questions, Mr. Gerlough. I am going to object to that question. He is trying now through this type of question to vary the terms of the written agreement which says we render monthly account, monthly statement.

The Court: That is their construction of it. You have a different construction and when you come to your part of the case you can make a different showing along that line. There hasn't been any settlement made. This isn't the final settlement.

(Testimony of Jean P. Gerlough.)

Mr. Everett: I will make the objection there has been no proper predicate laid for this question or this testimony.

The Court: There might be something in that. Go ahead and lay your testimony.

Mr. McCabe: In what respect is the foundation insufficient, if that is the statement?

Mr. Everett: I am not going to tell you, as I told you before, how to try a lawsuit; if you don't know, it is too late in the day for me to try and teach you.

Mr. McCabe: I have asked him and he refused to give the statement to which his objection is directed.

Mr. Everett: All right, if you want it, I [240] will tell you, sir. You have not shown any obligation any place to give any accounting or any kind other than what is shown by the written contract you have and that is in evidence.

Mr. McCabe: Oh, no, the law requires through rule an accounting, Mr. Everett. I will tell you something.

The Court: Now, here, we are not going to have any more of this.

The Witness: What is the question now?

Mr. McCabe: Read the question.

(Question read.)

Q. Or did they ever make such offer to the Potlatch Oil and Refining Company?

A. They did not.

(Testimony of Jean P. Gerlough.)

Q. Mr. Gerlough, on the statements which have been introduced in evidence there are certain expenditures with reference to the Swayzee Camp. Now were any of those buildings or equipment in connection with the Swayzee Camp located upon any of the lands embraced in the operating agreement involved in this action?

Mr. Everett: Wholly irrelevant and immaterial and we object to it.

The Court: Answer the question.

A. They were not.

Q. Now there were some references in these statements to a Sunohio water plant, was any part of the Sunohio water plant's properties or equipment located upon any of the lands [241] embraced in the operating agreement involved here?

Mr. Everett: Same objection.

A. I am not positive. They were not as far as operations were concerned. It is barely possible the line crossed one of these leases.

Q. Now were the buildings, any buildings or machinery connected with the water pumping or water conservation of the Sunohio water camp located on any part of these lands? A. No.

Q. In operating the Swayzee Camp, Mr. Gerlough, do you know whether The Ohio Oil Company made the charges appearing in the statements themselves on a basis of actual expenditures made on the lands embraced in the operating agreement in this case or whether they just lumped it and made a percentage charge against the Inland Empire Oil

(Testimony of Jean P. Gerlough.)

and Gas Syndicate and Potlatch Oil and Refining Company, do you know? A. Yes.

Q. What was their practice with respect to that?

A. They lumped all the charges and then prorated the cost on a percentage basis to the various leases.

Q. And that was done irrespective of any service to the lands involved in the agreement?

Mr. Everett: We object to that as calling for a conclusion.

Mr. McCabe: It is leading but it was saving time. [242]

Q. On these percentage charges were they based on actual service to the lands embraced in this operating agreement? A. They were not.

Mr. Everett: It calls for a conclusion of the witness.

The Court: Yes. Well you will have to split it up I guess and take more time on it.

Q. Well do you know of your own knowledge whether The Ohio Oil Company included expenditures for services of a Swayzee Camp and charged same against the Inland Empire Oil and Gas Syndicate and the Potlatch Oil and Refining Company when as a matter of fact they had not rendered any such services, do you know?

Mr. Everett: I object to the question, to the answer, the statements themselves are the best evidence as to what was included.

Mr. McCabe: The statements don't show that, your Honor.

(Testimony of Jean P. Gerlough.)

The Court: Answer the question.

A. Yes.

The Court: Did you understand it?

A. Yes.

The Court: Answer it. A. Yes.

The Court: All right. [243]

Q. (By Mr. McCabe): Now among the items of the statement that shows Sunburst District expenses now what practice did The Ohio Oil Company make with reference to charging the Inland Empire Oil and Gas Syndicate and the Potlatch Oil and Refining Company respectively with respect to those expenses?

Mr. Everett: We object on the same grounds again, your Honor.

The Court: Answer the question if you know.

A. Yes.

Q. And what was their practice in that respect?

A. They divided the cost according to the number of producing wells on their respective leases.

Q. And do you know whether of your own knowledge there were charges made for that service when as a matter of fact there was none of that service or expenditure made in the lands or upon the lands involved in this operating agreement?

Mr. Everett: I object to counsel's question which is based on facts not in evidence.

The Court: Well, do you know? A. Yes.

Q. What is the fact? A. How is that?

Q. What is the fact, did they make such charges and percentage charges of the district expenses

(Testimony of Jean P. Gerlough.)

when in fact there was no district expenses on the lands involved in this [244] action?

A. Yes, they have.

Mr. Everett: Same objection.

Q. And was that their practice generally?

Mr. Everett: Yes.

Q. Now during the year 1922 were you familiar with the location of the lands embraced in the operating agreement involved in this action?

A. Yes.

Q. And were you also acquainted with the lands generally in the area known as the Kevin-Sunburst Oil Field or Kevin-Sunburst Field?

A. Yes, I was.

Q. Do you know whether during the year 1922 there were any producing wells drilled and brought to commercial production in the area of the lands involved in this agreement? A. Yes.

Mr. Everett: It is wholly irrelevant and immaterial.

A. Yes.

Q. What wells were brought in?

A. Sunburst Oil and Gas Company Davey Well No. 1, located in the SE SE SW quarter of Section 34, 36 2 W and was brought into production on or about the 5th of June, 1922.

Q. And with respect to the acreage involved in this agreement where was, how far was this acreage removed approximately from this producing [245] well?

A. It varied all the way from half a mile to two miles.

(Testimony of Jean P. Gerlough.)

Q. And was this land in the general area, the land in the operating agreement in the general area surrounding the producing well?

A. These lands encircled the producing well.

Mr. McCabe: I believe that is all. You may take the witness.

The Court: I think we had better have a recess.

(3:30 p.m.)

(Court resumed, pursuant to recess, at 3:45 o'clock p.m., at which time all counsel were present.)

The Court: Proceed.

JEAN P. GERLOUGH

resumed the stand and testified as follows:

Cross-Examination

By Mr. Everett:

Q. Mr. Gerlough, could you find amongst the statements that were rendered to you by The Ohio the statement for August of 1924?

A. The statement to the Potlatch?

Q. To Potlatch for August of 1924. In the answers of Potlatch Oil and Refining Company to the interrogatories of this defendant it was stated that the credit balances shown [246] of the respective statements were accompanied by a check for those amounts. And it was stated by you as manager and secretary of Potlatch in answer to defendant's interrogatory No. 9 that checks were received and dates

(Testimony of Jean P. Gerlough.)

of the statements varying approximately from 20 to 30 days following the dates of the respective statements in the amounts of respective stated credit balances with the following exceptions, to wit: (a) May 31, 1924, credit balance shown on statement was \$2,721.29, amount of check received \$2,221.29. Then the same statement is made with reference to the statement of June 30th, 1924, and July 31, 1924, showing a difference of \$500.00 between the credit balance on the statement and the amount of the check received. I will hand you from Plaintiffs' Exhibit B the statement of The Ohio Oil Company, dated August 30th, 1924, and ask you if the credit balance of \$500.00 which represents that \$500.00 carried through those three months is shown and included in the check for that month?

A. Yes, there is a credit balance shown here of \$500.00, August 1st, 1924.

Q. Could you tell from looking at the statements for May 31, July 30th and July 31st, whether that is the same \$500.00 as is carried forward in those three preceding statements?

A. There is a credit balance carried forward in each of these three statements of \$500.00. [247]

Q. And is included in the total that was paid in August or with the check that accompanied the August statement?

A. Apparently, yes.

Q. In connection with the Inland Empire Oil and Gas Syndicate will you state whether The Ohio Oil Company has furnished you with statements of

(Testimony of Jean P. Gerlough.)

account under the operating agreement of June 15, 1922? A. They have.

Q. Do you have that original contract of June 15, 1922? A. Yes, we have.

Mr. McCabe: We have a certified copy of it, Mr. Everett. We just can't place that contract. We had it and I have been looking for it but we can't locate it, but I do have a certified copy certified by the county clerk and recorder of Toole County, Montana. I brought that and that is all we can find. If you have a copy of it, I have no objection to your using it.

Mr. Everett: Well I wanted the original agreement, Mr. McCabe.

Mr. McCabe: Do I understand you correctly you are referring to an agreement between the Potlatch Oil and Refining Company and The Ohio Oil Company?

Mr. Everett: I want that one too. I wanted the suit contract is the one I wanted, Mr. McCabe.

Mr. McCabe: You have those original agreements yourself. [248]

Mr. Everett: I wanted to see yours. I don't seem to find the original of mine.

Mr. McCabe: It is admitted by the pleadings, your Honor, the contract was executed and a true and correct copy is attached to the complaint. There is no issue here as to any difference and there is no defense raised there is any difference between the copies of the contract and the original that was made, and we have had no demand made upon us

(Testimony of Jean P. Gerlough.)

for the original contract of June 22, 1922, between the Troy Sweet Grass Company and The Ohio Oil Company. We do have a demand for the other contract.

The Court: All right, you haven't got it. You haven't got the original and you both admitted that Exhibit A attached to the complaint is the contract; is that right?

Mr. Everett: I wanted it for the purpose of convenience in examining the witness.

Q. (By Mr. Everett): When did Ohio first furnish Inland Empire with a statement of account?

A. On August 31st, 1922.

Q. And that is with reference to operations on the Baker, what is called the Baker well, Baker lease.

A. That is right. The Inland has no interest in any of the other leases.

Q. And when did Ohio furnish the last statement of account [249] to Inland?

A. January 31st, 1943.

Q. And did Ohio furnish Inland with a statement of account for each and every month from and after August, 1922?

A. Yes, they did.

Q. And do any of those statements show credit balances?

A. Yes, they do.

Q. And these statements, Plaintiffs' Exhibit A, are all of the original statements furnished to Inland?

A. That is all the statements furnished by The Ohio Oil Company to Inland.

(Testimony of Jean P. Gerlough.)

Q. And that is one for each and every month?

A. That is right.

Q. And each month where a credit balance is shown on those statements was it accompanied by a check?

A. Yes, it was.

Q. And were those checks currently received by Inland?

A. Yes, they were.

Q. With each such statement, and the amounts of the checks correspond to the credit balances?

Mr. McCabe: Your Honor, we object to all this testimony as purely improper cross-examination, and for the further reason that all of this is admitted; it is admitted in the stipulation between us that they furnished statements each month and on such months as showed a credit they sent us a check for those statements, so it seems to me we are [250] going into a lot of matters already admitted in evidence by the stipulation or by the pleadings.

The Court: Yes, I suppose on cross-examination he might be allowed a certain latitude of testing the recollection of the knowledge of the witness.

Mr. McCabe: I withdraw the objection to save time.

Q. Do you have——

Mr. Everett: Do you have, Mr. McCabe, the original operating agreement of June 15, 1922, between Potlatch Oil and Refining Company and The Ohio Oil Company?

Mr. McCabe: I don't have the original but I have a certified copy.

(Testimony of Jean P. Gerlough.)

Mr. Everett: You have a certified copy; may I have it?

Mr. McCabe: Yes. We searched for it and I located a carbon copy and also a certified copy.

Mr. Everett: I have a photostatic copy, your Honor.

Mr. McCabe: I located the original. I thought it was a certified copy but it is the original.

(Whereupon said instrument was marked for identification Defendant's Exhibit "G.")

Q. I hand you an instrument marked Defendant's Exhibit G for identification and ask you to examine it and state what it is?

A. An operating agreement between the Potlatch Oil and [251] Refining Company and The Ohio Oil Company, dated June 15, 1922.

Q. Have you ever seen that contract before?

A. Yes, I have.

Q. You are familiar with the contract in suit and contract of same date of Troy Sweet Grass Syndicate?

A. Yes, I am.

Q. Have you had occasion to compare the two instruments?

A. Yes, I think I have.

Q. Can you state what difference if any there are between the two?

A. My recollection is that the wording of the contract is identical. I have never compared the signatures.

Q. Well is there any difference in the description of the lands covered?

(Testimony of Jean P. Gerlough.)

A. Between this contract and which one?

Q. And the contract in suit, the Troy Sweet Grass contract in suit?

A. I am not sure. They are two operating agreements; two separate agreements.

Q. Well that is the point I am trying to prove; there were two separate agreements and that they are identical except for the description?

A. The description of the lands.

Q. And the names of the parties?

A. That is right. [252]

Mr. Everett: We offer in evidence Defendant's Exhibit G.

Mr. McCabe: I fail to see the materiality or competency of this evidence. It is not admissible under cross-examination and I don't want to bring issues into this case not covered by the pleadings, and the action, this action is based on a contract of June 22nd, 1922, or June 15th, 1922, between Troy Sweet Grass Oil Syndicate and The Ohio Oil Company, and is maintained by an action, and this action is being maintained to obtain an accounting of expenditures and receipts under that contract there and under this contract here. This is an altogether different contract to that involved in this action.

The Court: You are not suing on the other contract?

Mr. McCabe: No, this is an altogether different contract.

The Court: What is the idea?

(Testimony of Jean P. Gerlough.)

Mr. Everett: The purpose is to show that the contracts with these same companies in the same field and made at the same time are identical and that the accounting under all of them have been the same when we come to the question of accounting.

Mr. McCabe: That is clearly immaterial.

Mr. Everett: This is a matter which concerns matters involved in the issue, may be involved in issue [253] which depending upon the court's rulings whether it may or may not be varied by oral testimony when raised it becomes material. Here is an officer of Potlatch testifying to an identical contract made at the time between his company and Ohio, and I think you will find the rule to be under the Montana statutes, Mr. McCabe, that concurrent agreements or agreements between the same parties at the same time or in the same area may be admissible to show a construction of the parties and intention of the parties.

Mr. McCabe: The situation of that statement of Mr. Everett, if your Honor please, is the fact the parties to this contract are not the same parties to the contract involved in this action. Here is a contract between Potlatch Oil and Refining Company and The Ohio Oil Company as primary parties to this. The contract involved in this action is a contract between Troy Sweet Grass and The Ohio Oil Company, involving altogether different land and the action is being maintained by the Potlatch Oil and Refining Company and Inland Empire Oil

(Testimony of Jean P. Gerlough.)

and Gas Syndicate upon the, as assignees or successors in interest of Troy Sweet Grass Company under the first contract. There is no issue raised in here nor is any other contract pleaded in here either by the plaintiff or defendant, and certainly there is nothing in the pleadings to support this contract that now is an exhibit proposed to be offered in evidence. [254]

Mr. Everett: Would you like to hear the statute, your Honor?

The Court: Let's not take up any more time on that. I will admit it under your objection, subject to your objection.

(Whereupon said Defendant's Exhibit "G," offered and received in evidence, subject to objection of plaintiffs' counsel, is a part of this record.)

(Whereupon an instrument was marked for identification as Defendant's proposed Exhibit "H.")

Q. (By Mr. Everett): I hand you Defendant's proposed Exhibit H, and ask you to examine it and state what it is?

A. An operating agreement between Troy Sweet Grass Oil Syndicate and The Ohio Oil Company, dated June 15th, 1922.

Q. Will you compare it with Defendant's Exhibit G and state the differences there are in the two agreements, if any, other than the description and the parties?

(Testimony of Jean P. Gerlough.)

The Court: How many pages? Are you reading it word for word?

A. The wording of the two appears to be identical with the exception of the descriptions and the signatures.

Q. And the proposed Exhibit H is executed by Troy Sweet Grass Oil Syndicate and by T. P. Jones, President, and Kenneth Luke, Secretary?

A. Right. [255]

Q. Do you remember of ever having seen a duplicate of this agreement at any time?

A. Yes, I have.

Q. In the files of what company?

A. Inland Empire Oil and Gas Syndicate.

Mr. McCabe: May I look at it?

Mr. Everett: We offer—Do you have any objection Mr. McCabe, to our substituting a photostatic copy for the original?

Mr. McCabe: Which one?

Mr. Everett: This last one?

Mr. McCabe: No objection as to its being a copy. I have an objection as to——

Mr. Everett: I understand that. Is that satisfactory to the court to substitute this photostat?

Mr. McCabe: To the offered in evidence proposed Exhibit H the plaintiff objects on the grounds it is improper cross-examination. It is incompetent, irrelevant and immaterial for any purpose. It is not within the issues and relates to an entirely different contract, entirely separate and distinct contract not connected in any way with the contract involved

(Testimony of Jean P. Gerlough.)

or the operating agreement involved in this action. And, furthermore, it relates to altogether different land, and for the further reason no place in the pleadings is this contract referred to, and for the further reason no proper foundation has been laid for the introduction of the [256] Plaintiffs' Exhibit H.

The Court: It may be received subject to your objection the same as the other one.

(Whereupon said Defendant's Exhibit H, offered and received in evidence, subject to objection, is a part of this record.)

Q. (By Mr. Everett): What statements are included in this, in plaintiffs' exhibits other than statements covering the Baker and I. Sinton leases?

A. Statements covering operations on the Oliver O'Hannon farm and the B. Sinton farms.

Q. And those lands are described—do you know the description of those lands?

A. The Oliver O'Hannon is the East Half of the West Half and the West Half of the East Half of Section 26, Township 36 North, Range 2 West; and the B. Sinton farm consists of the South Half of Section 1, Township 35 North, Range 2 West.

Q. And those are the lands described in this contract, is that correct, referring to Defendant's Exhibit G? A. That is correct.

Q. And the accounts with reference to operations under this operating agreement were they in the same form or are they in the same form as the

(Testimony of Jean P. Gerlough.)

accounts with reference to the [257] Baker and I. Sinton leases?

A. The statements of accounts?

Q. Yes. A. Were on the same form, yes.

Q. Cover the same general headings and subject matter? A. That is right.

Q. Do you recall whether The Ohio Oil Company ever reconveyed to the Potlatch Oil and Refining Company any part of the lands described in the Exhibit G. I will place my question in another way—strike that please. Did The Ohio Oil Company ever reconvey to Potlatch Oil and Refining Company the lands described as the Oliver O'Hannon lease?

A. Yes.

Mr. McCabe: Just a moment. To which we object on the ground no foundation laid for the question; it attempts to elicit evidence that is not proper on cross-examination. It is wholly not within the issues involved in this case, and it is wholly irrelevant and immaterial and incompetent for any purpose.

Mr. Everett: You introduced statements, Mr. McCabe, from that same lease.

Q. (By Mr. Everett): What was your answer?

A. Yes.

Q. Do you recall when that was?

A. I don't recall the date, no.

Q. Can you state approximately when it was?

A. No, I don't remember.

(Whereupon instruments were marked Defendant's Exhibits I and J for identification.)

(Testimony of Jean P. Gerlough.)

Q. (By Mr. Everett): Have you ever examined the original of the assignment about which you testified covering the Oliver O'Hannon lease from Ohio?

A. Yes, I have.

Q. Would you look at Defendant's proposed Exhibit I and state what that is?

A. It is an assignment from The Ohio Oil Company to Potlatch Oil and Refining Company of the Oliver O'Hannon lease, East Half of the—I don't see all the description here.

Q. And does that appear to be a true and correct photostatic copy of the original?

A. As near as I can recall it is a true copy.

Q. And I hand you Defendant's proposed Exhibit J and ask you to state that that is?

A. It is a cancellation of operating agreement between Potlatch Oil and Refining Company and The Ohio Oil Company covering the Oliver O'Hannon lease.

Q. Have you ever seen the original of that instrument?

A. Yes, I have.

Q. Does that appear to be a true and correct copy?

A. It does. [259]

Mr. Everett: I might state to the court we have made diligent effort to find these. I didn't actually notify plaintiffs to produce the originals but I assumed that Mr. McCabe would have no objection in view of this witness' testimony to substitute the photostat for the original, even though he may have other objections.

Mr. McCabe: To this offer in evidence of De-

(Testimony of Jean P. Gerlough.)

Defendant's proposed Exhibits I and J the Plaintiffs object on the ground that they are wholly irrelevant and immaterial for any purpose, no proper foundation has been laid for the admission of these instruments; that it attempts to inject into this case collateral questions that are wholly without foundation in the pleadings in this case and relates to different lands and entirely different contract than the operating agreement involved in this action.

The Court: It seems to me there is evidence in here about those O'Hannon lands and it is difficult for the court to say at this moment whether it is material or not.

Mr. McCabe: I just want to make my objection.

The Court: I will receive them subject to the objection, receive both exhibits, I and J.

(Whereupon said Defendant's Exhibits I and J, offered and received in evidence, subject to objection, are a part of this record.) [260]

Q. (By Mr. Everett): Were you personally acquainted with Mr. John McFayden?

A. Yes, I was.

Q. Is it a fact he was or was not the Division Manager?

A. I knew him to be the Division Manager of The Ohio Oil Company.

Q. In the Sweet Grass Arch or Kevin Sunburst, or whatever you call that field—

A. Yes.

Q. Including the Baker and Sinton leases?

A. Yes.

(Testimony of Jean P. Gerlough.)

Q. As well as the O'Hannon and Baptise C. Sinton leases? A. Yes.

Q. You testified with reference to certain sales of oil from the field, who was the principal purchaser of oil in the field or has been the principal purchaser of oil in the field during the period from the time Inland Empire Syndicate and Potlatch Oil became interested in there?

A. I think that varied from time to time. At the time I testified I believe that International was purchasing the most of the oil in the field.

Q. What was the capacity of that refinery?

A. In barrels?

Q. In barrels per day?

A. At the time I can't recall. I think it was 3,000 [261] barrels or 4,000.

Q. And were they purchasing crude oil to the extent of their capacity to run during that time you testified about?

A. Yes, we were producing enough from the Shoshoni pool to run that refinery.

Q. So any oil over and above the amount they were purchasing couldn't be run through that refinery, would that be your reasonable conclusion?

A. There were times when the crude oil was stored in the field, they weren't running the refinery at all times and both the Ohio and International stored oil at certain times but I don't recall those times, dates.

Q. Well is it your general impression or recol-

(Testimony of Jean P. Gerlough.)

lection that the refinery was running all the oil it could handle during that period?

A. They were running. I don't know whether they were running absolutely to capacity or not, and they were enlarging the capacity of the refinery from time to time. I couldn't answer that definitely.

Q. And the sales of Shoshoni—

A. Shoshoni Oil Company.

Q. To the refinery—you were manager of the Shoshoni at that time? A. Yes, I was.

Q. What were the arrangements under which you were selling your oil to the International Oil and Refining Company? [262]

A. There were spot oil purchases from in the middle of July, 1924, until the spring of 1925. I think it was March, 1925, and after that a contract was entered into with International Refining Company for the purchase of that oil.

Q. And do you recall the terms of that contract or do you have the contract with you?

A. I haven't it with me, no.

Q. Do you recall the terms of the contract with reference to the matter of price to be paid for oil to be purchased thereunder?

A. No, I do not. I don't remember the terms.

Q. Who posted prices in the field?

A. The Ohio Oil Company had a price which they said was the posted field price but other purchasers were not going by that price.

Q. During what period?

A. From 1924 until 1928 to my knowledge.

(Testimony of Jean P. Gerlough.)

Q. What price did Shoshoni Oil Company receive for its oil from International Refining Company, is it?

A. Yes. The price varied from time to time.

Q. Well with relation to the price at which Ohio was purchasing in the field?

A. Well from July, 1924, until I believe October, 1926, International Refining Company was paying 12½ cents [263] a barrel more for oil than The Ohio Oil Company was; and from 1926 on until through into 1928 International Refining was paying ten cents a barrel more than The Ohio Oil Company was.

Q. During that period that Shoshoni and other producers in the field were selling to International Refining Company were those sales all under special contract?

A. No, I don't believe so. There were some contracts and a lot of them were spot sales.

Q. What do you mean by spot sales?

A. Well it is just a verbal agreement; the purchaser agrees to take your oil.

Q. He agrees to buy 2,000 barrels of oil?

A. Oh, yes, agrees to buy so much oil and pay so much for it; no written contract involved.

Q. But they were special arrangements?

A. Yes.

Q. And that was the situation with your company, Mr. Gerlough?

A. That was the situation with all the companies I was familiar with in that part of the field and

(Testimony of Jean P. Gerlough.)

there were six or seven companies selling oil out of that pool at that time.

Q. You testified with reference to a meeting of the trustees of Inland Empire Oil and Gas Syndicate?

Mr. Everett: Do you have the minutes of [264] that meeting, Mr. McCabe?

Mr. McCabe: What meeting was that?

Mr. Everett: The meeting about which you endeavored to have him testify.

Mr. McCabe: Do you have those minutes here?

Mr. McCabe: There was no minutes made. It was just a meeting called to discuss the situation.

Mr. Everett: Do you have the minutes of the Potlatch Oil and Refining Company?

Mr. McCabe: Yes, I have.

Mr. Everett: May we see those, Mr. McCabe?

Mr. McCabe: What is it you want? You gave a notice to produce just one meeting.

Mr. Everett: Well let's see that meeting.

Mr. McCabe: We will object to going all over the minutes of the Potlatch Oil Company in the absence of notice to produce and in the absence of showing any materiality of the evidence.

Mr. McCabe: If the court please, we ask that counsel be confined to specifying certain meetings and having those meetings, having the witness identify those meetings and not come in here under the guise of cross-examination and attempt to make a discovery proceeding here. Now we have been served with notice to produce meetings of the com-

(Testimony of Jean P. Gerlough.)

pany as to a certain day and I think counsel should be [265] limited to that notice as to minutes.

Mr. Everett: I have no desire to read your proceedings, Mr. McCabe.

Mr. McCabe: Are you through with that?

Mr. Everett: No, I am not through with it. Could you point out the minutes to me of July 13, 1932, again?

The Witness: Potlatch Oil and Refining Company.

Q. And to the minutes of July 14th, 1932, I will ask you to read the portion thereof concerning the action taken with reference to Mr. T. P. Jones there?

Mr. McCabe: I would like to look at that and form an objection before the witness reads it.

The Court: Very well.

Mr. McCabe: We object to the question and to the evidence attempted to be elicited by the question on the reading of the portion of the minutes referred to on the ground that the minute entry is wholly incompetent, irrelevant and immaterial, and relates to a matter not within the issues; and, furthermore, does not relate to any matter testified by the witness on direct examination; and for the further reason that it refers to a controversy between persons who as far as the parties to this action are concerned are wholly unrelated in any manner to the action; and for the further reason that it is an attempt to contradict evidence which the plaintiffs brought out on cross-examination in, at the time of the [266]

(Testimony of Jean P. Gerlough.)

taking of the Jones deposition and the defendant is bound by such evidence, and it relates entirely to a collateral matter and has no bearing whatsoever on any issue in this case.

Mr. Everett: Could I answer that objection?

The Court: Yes.

Mr. Everett: The plaintiffs here have presented as a witness one T. P. Jones and certainly we as defendants are entitled to attack his credibility in any way that we can and certainly from their own records, and I call the court's and counsel's attention to the fact that Mr. Gerlough is not only a witness to this action but he is a party to a suit, and if you don't want to ask him on cross-examination, we will ask him as a party to the case.

Mr. McCabe: We object to it for the further reason that this testimony——

The Court: Perhaps it isn't proper cross-examination but you can make your introduction to it in chief on the defense.

Mr. McCabe: As I understand this is improper cross-examination, and counsel is adopting the evidence as evidence in chief in support of his case, is that right?

The Court: I don't know what he is going to do. I thought it was improper cross-examination; that is the only part of your objection I am ruling on and that is enough. [267]

Mr. Everett: If Mr. McCabe would rather, I will wait and ask Mr. Gerlough to take the stand on defense. I think I am entitled to cross-examine any

(Testimony of Jean P. Gerlough.)

party to the suit and cross-examine him and not be bound by his testimony under the rules.

Mr. McCabe: All right, if he wants to make him his witness, he can.

The Court: You want to make him your own witness?

Mr. Everett: I want to examine him as a party to the suit.

The Court: Very well, you may do that. You may make your objection.

Mr. McCabe: Now as to this evidence attempted to be introduced or elicited by the defendant this is wholly incompetent, irrelevant and immaterial for any purpose, your Honor.

The Court: You have already made your objection?

Mr. McCabe: I had.

The Court: I am allowing him to do this subject to your objection.

Mr. McCabe: Oh.

The Court: I will see later on whether it is material.

The Witness: This is a resolution entered in the minutes of July 14th, 1932, in the minute book of the Potlatch Oil and [268] Refining Company. Whereas at the meeting in Spokane Mr. Jones assured the board that the Jones Oil Company would before June 16th, 1932, reassign to the Potlatch Oil and Refining Company the two A. L. Perkins leases and on that assurance it was agreed that the suits now pending would not be prosecuted by the Pot-

(Testimony of Jean P. Gerlough.)

latch Oil and Refining Company, and, whereas, T. P. Jones or the Jones Oil Company have failed to execute and deliver such releases, and, whereas, since the meeting in Spokane further discrepancies and questionable accounts on the part of Mr. Jones have come to light, and, whereas, since the arrival of members of the board in Shelby for the purpose of attending this meeting several matters have come to the attention of the board which are causing considerable inconvenience, annoyance and monetary loss to the Potlatch Oil and Refining Company, now, therefore, be it hereby resolved that the General Manager instruct the company's attorney, L. P. Donovan, to carry the pending suits to a verdict, and also use every effort to recover personal property owned by the Potlatch Oil and Refining Company that has either been lost, strayed or stolen, and further at this time its being seized, sold and removed by the creditors of T. P. Jones or Jones Oil Company. And be it further resolved that T. P. Jones and Jones Oil Company be requested to vacate the offices and rooms of the Potlatch Oil and Refining Company and turn over the keys thereto. [269]

Q. You were reading from the original minute book of the Potlatch Oil and Refining Company?

A. That is correct.

Q. July 14th, 1932? A. That is right.

Q. And that is a true and correct report of the action taken on that date? A. That is right.

Mr. McCabe: If your honor please, I desire right at this time to cross-examine this witness as to this

(Testimony of Jean P. Gerlough.)

particular entry because it is so clearly a collateral matter that I am satisfied upon cross-examination the entire evidence will be excluded.

Q. (By Mr. McCabe): Mr. Gerlough, at the time when this meeting was had and these minutes were prepared was there any action pending against Mr. Jones personally? A. No.

Q. And what was the action that was pending?

A. An action pending to recover certain leases which had been assigned previously to the Jones Oil Company.

Q. And what was Jones Oil Company, a corporation?

A. I believe it was a Montana corporation. I couldn't testify as to that.

Q. At the time when this suit was being maintained was Mr. Jones a resident of Montana?

A. Mr. Jones?

Q. Yes.

A. He lived at Shelby; his residence was in Vogel, Idaho. [270]

Q. And at the time these minutes were written was Mr. Jones in Shelby, Montana? A. No.

Q. And this suit that was brought do you know whether or not the service of summons in the action was served upon Mr. Jones or some other officer of the company?

Mr. Everett: I object to that. I think the best evidence rule should apply even on cross-examination.

(Testimony of Jean P. Gerlough.)

Mr. McCabe: This is cross-examination, your Honor.

The Witness: Service was accepted by E. A. Rice, Secretary of the Jones Oil Company in Shelby.

Q. Now with respect to the suit it was merely a controversy between the Jones Oil Company, a corporation, and the Potlatch Oil and Refining Company, a corporation? A. That is correct.

Q. And the Jones Oil Company was claiming as an offset to the claims of the Potlatch Oil and Refining Company that the Potlatch Oil and Refining Company was indebted to Mr. Jones, the President, in a large sum of money? A. That is right.

Q. And the question of Mr. Jones' honesty or credibility was not involved in this suit in any way, was it, the suit you testified to?

A. No, not the suit to recover the leases, no.

Mr. McCabe: Now, if your Honor please, we move to strike this evidence to show it relates to an independent [271] matter and the entire controversy is not proper evidence to test the credibility of a witness.

The Court: What have you to say? How are you going to connect it up with Jones or with this suit? Have you any way of doing that?

Mr. Everett: I think the minutes to the action taken accord what the instructions were in proceeding with the suit. The minutes themselves discredit Mr. Jones. He testified he left the company in 1932, and I would like to go on now and we have this thing to show the circumstances under which

(Testimony of Jean P. Gerlough.)

he left the Potlatch employ were anything but savory as I understand it.

Mr. McCabe: This is certainly clearly improper cross-examination as to how you are going to test the credibility of Mr. Jones; at any rate when he already made this man his witness. I renew my objection and move to strike it.

Mr. Everett: Mr. Gerlough is a party to this suit.

Q. (By Mr. Everett): Do you know what the circumstances were upon Mr. Jones leaving the employ of the Potlatch Oil and Refining Company?

A. Yes, I do.

Q. Would you relate those circumstances?

A. Jones Oil Company had gone broke and they were unable to perform the terms of their leases and contracts with the Potlatch Oil and Refining Company. They were behind in their [272] payments on royalty and lease rentals and so forth on the leases. They were unable to pay and the Jones Oil Company hadn't made restitution to the Potlatch in that connection and the company therefore started action to recover the leases and to get a judgment against the Jones Oil Company covering the royalties and rentals and one thing and another which the Jones Oil Company owed to the Potlatch.

Q. Had Mr. Jones overdrawn his salary?

Mr. McCabe: Just a minute. To which we object on the grounds that is clearly improper and inadmissible for any purpose, and if it is an attempt to impeach Mr. Jones, there's no foundation has been

(Testimony of Jean P. Gerlough.)

laid for the admission of this evidence and it wholly fails to attack or prove Mr. Jones is not a credible witness. The statutes of Montana provide that a person may be impeached by proof of bad character or that is by proof of general reputation for truth, honesty and integrity, and that the witness has made prior contradictory statements, and such evidence must be on a material point involved in the case and not to some collateral matter, and that is the rule as to testing credibility and also the rule as to impeachment.

The Court: Well I will permit him to say under what circumstances he left the company subject to your objection and then we will see later on whether it has any materiality at all. I don't know what their proof is going [273] to be because I am not a mind reader but when the evidence is all in then I will be better able to judge materiality and admissibility of this testimony in respect to Jones.

Mr. Everett: Read the last question.

(Question read.)

Q. Had Mr. Jones overdrawn his salary?

A. At the time Mr.—there was certain disputes with the management of the company. There was internal dissension in the company what should be done and what should not be done, and at the time this dissension came up Mr. Jones had claims against the company for several thousand dollars for services and expenses and all at the same time his account was overdrawn in the company, and it is my

(Testimony of Jean P. Gerlough.)

recollection that his claims for services and expenses exceeded the amount of the company claims against him for overdraft in his account. At any rate there was a general discussion about the matter at the meeting in Spokane and the stockholders listened to the whole story and finally the matter was dropped and Mr. Jones resigned of his own free will and that is all there was to it.

Q. That was in 1932 when he left the company?

A. That is right. That was as I say at that time Jones Oil Company had failed and couldn't meet its obligations and the stockholders were somewhat dissatisfied with the way the company, Potlatch Company, was being managed and they suggested that we have a new management. [274]

Q. I have here Plaintiffs' Exhibit E which is the transmittal voucher from Ohio to Potlatch Oil and Gas Syndicate from July 23, 1924 to March 23, 1924, and June 24, 1924 to July 23, 1932, from The Ohio Oil Company to Potlatch Oil and Refining Company; were there any additional transmittal vouchers received with each respective statement whenever there was a credit balance?

A. No, there was no voucher of transmittal with each statement when they were received. Not all of the statements, of course, are there. Some of them are attached with paper clips and lost but all we could find are there.

Q. All that you could find are here?

A. Yes, but each one did have one of those statements attached to it.

(Testimony of Jean P. Gerlough.)

Q. Statements showing credit balances from the beginning right on down to 1943, January, 1943?

A. Now, Mr. Everett, I can't recall each and every statement over the past 25 years; there may have been one or two that didn't have it.

Q. But your recollection?

A. My best recollection is each statement was accompanied with one of those vouchers.

Q. But these are most of them?

A. Yes, that is most of them.

Q. And was that true with all of the leases operated by [275] The Ohio Oil Company and Troy-Sweet Grass and Inland Empire and Potlatch Oil and Refining Company? A. Yes.

Q. Now the statements from Troy-Sweet Grass which were those, The Ohio to Troy-Sweet Grass, referring to Plaintiffs' Exhibit D, from September, 1922, to August, 1923, these are the original statements? A. Yes, they were.

Q. And they came from the files of what company?

A. Troy Sweet Grass. Well, they have been in the possession of the Potlatch Oil and Refining Company as successors in interest to the Troy Sweet Grass Oil and Gas Syndicate.

Q. Have you examined these statements?

A. I have.

Q. And are they in the same form that they were rendered to Potlatch and Inland Empire?

A. Yes, they are.

Q. Covering the same items?

(Testimony of Jean P. Gerlough.)

A. Same character of items.

Q. Same character of items? A. Yes.

Mr. Everett: Do you have, Mr. McCabe, the letter of October 14th, 1924, with date line Deary, Idaho, addressed to Inland Empire, and October 17th, Mr. Wilson to Mr. Harsh?

Mr. McCabe: We have those letters you refer to but I thought you would come here at quarter to two and I would segregate these letters and deliver them to you to see that [276] you had them. Now I have a whole bunch of letters and consequently I have to go through these to get this letter.

Mr. Everett: I asked you if you would line them up.

Q. (By Mr. Everett): I hand you Defendant's Exhibits K and L, so marked for identification and ask you to state if that is the signature of T. P. Jones and J. A. Harsh and the trustees' seal of the Troy Sweet Grass Oil Syndicate?

A. Yes, that is the signature of Mr. Jones and Mr. Harsh.

Q. And is that the seal of the company or syndicate? A. That is right.

Q. And the signatures appearing on the bottom of the page?

A. They are likewise those of Mr. Jones and Mr. Harsh.

Q. And the seal affixed?

A. Potlatch Oil and Refining Company.

Q. I hand you Exhibit L and ask you if those are the signature of Mr. Jones on that instrument?

(Testimony of Jean P. Gerlough.)

A. Yes, it is the signature of Mr. Jones.

Q. In both places? A. Yes.

Q. These proposed exhibits are labeled or called transfers, transfer and division orders, one of them. They are both dated August 3rd, 1923, and relate to the interest of Potlatch Oil and Refining Company in the Irving H. Baker farm with the legal description of the lands which authorizes the Ohio [277] until further notice to receive oil from wells for purchase from the parties severally in the proportions named, and I will ask you if that authorization was ever cancelled by action of the board of directors of Potlatch?

A. As far as I know it never was.

Q. Well, you have the minutes of the Potlatch, would you review those and see if you find any record of any action ever terminating these transfer division orders?

A. I will be glad to look in the minutes but I couldn't say whether that was ever revoked or not. I don't recall it was.

Q. Well, if you would look in them, I could ask you in the morning and then you could testify for sure? A. Yes.

Mr. Everett: Then will you mark this as Defendant's Exhibit M?

(Whereupon said instrument was marked for identification Defendant's Exhibit M.)

Q. (By Mr. Everett): Are you familiar with Mr. Harsh's signature? A. Yes, I am.

(Testimony of Jean P. Gerlough.)

Q. Would you state whether that is his signature on Defendant's proposed Exhibit M?

A. Yes, that is his signature.

Q. And he signs as—in what capacity does he sign the instrument? [278]

A. As Treasurer of the Troy Sweet Grass Oil Syndicate.

Q. You testified I believe that you were an interest holder in the Troy Sweet Grass Oil Syndicate?

A. Yes.

Q. Do you know whether this authorization was ever revoked by action of that syndicate?

A. Not to my knowledge.

Q. Do you have the records of the trustees of the Troy Sweet Grass Oil Syndicate?

A. Minutes?

Q. Yes. A. Yes, I have.

Q. Would you examine them and see if they reflect any reference with reference to having revoked this authorization?

A. Yes, I will.

Mr. Everett: I think that is all we have in connection with cross-examination, your Honor.

The Court: Any redirect?

Mr. McCabe: Yes, I would like to have recross. He has gone into an entirely new matter I haven't covered.

The Court: Go ahead.

Q. (By Mr. McCabe): Mr. Gerlough, referring you to the time when this meeting of July 14th, 1932, was held, and extracts from which minutes have been read into the record, I understood you to say that

(Testimony of Jean P. Gerlough.)

Mr. Jones was overdrawn in his account; by that did you refer that the books of the Potlatch Oil and Refining Company indicated he was overdrawn in his account? [279] A. Yes, that is right.

Q. As against that you further stated he had a claim of several thousand dollars for expenses and services as an offset he was claiming to this amount?

A. That is also correct.

Q. And then isn't it the fact that when the directors examined this account of Mr. Jones and the offset they agreed to offset one claim against the other and do nothing further?

A. Yes, they dropped the whole matter.

Q. That is right? A. That is right.

Mr. McCabe: That is all.

Mr. Everett: While the witness is on the stand I would like to introduce in evidence Defendant's Exhibits K, L and M.

Mr. McCabe: Of course, as far as the instruments are concerned there is no particular objection except that I fail to see that it has any material bearing on this case. There is no time fixed during the running of this agreement. It is merely a statement of The Ohio Oil Company that they will purchase this oil from the Potlatch and Inland and the market price they paid. The market price is not determined by The Ohio Oil Company. The market price is determined by the prevailing price paid by buyers generally in the area, and this is a limitation. If it is the purpose of the defendant to offer this to show just merely that they made this division [280]

(Testimony of Jean P. Gerlough.)

order that is all right, I have no particular objection to it; however, if it is maintained that this division order was agreed upon and continued in effect indefinitely, then I say there will have to be some evidence to connect up these particular exhibits; and, of course, I object on the ground it is not connected up properly and no foundation laid for its admission.

Mr. Everett: The offer was general. I didn't offer it for any specific purpose.

Mr. Donovan: Counsel is in error when he says under the terms of the division order the Ohio should pay some general market price. The language of the order is the oil so received in pursuance of this division order shall be paid for to the well owners or their assigns in proportion to their respective interest shown above at the market price paid by The Ohio Oil Company. Counsel said that the Ohio didn't fix the price but it is the market price paid by The Ohio Oil Company for the same kind and quality of oil on the date of its receipt that fixes the price and the parties here have agreed to that and fixed the—well—it is to remain in force until further notice; The Ohio Oil Company is hereby authorized until further notice to receive oil from these wells.

Mr. McCabe: The instrument is merely a restatement of the terms of the contract. The contract is they will pay the prevailing market price at the wells and that is the [281] obligation they were to

(Testimony of Jean P. Gerlough.)

perform. This is merely a statement that they would pay that market price and it is just repetition.

The Court: It may be received in evidence.

(Whereupon said Defendant's Exhibits K, L, and M, offered and received in evidence, are a part of this record.)

Mr. Everett: Now may it please the court, we have reached the time the court usually adjourns, and I just want one more question from the witness. He is going to look in the minutes to determine the answers to the questions I propounded to him, and I think we can start off in the morning if the court wishes to adjourn at this time. The only thought I had if it wouldn't be imposing too much on counsel or court, we might start earlier in the hopes we can finish with these preliminary matters tomorrow.

The Court: How many more witnesses have you got?

Mr. McCabe: Just the introduction of some communications between The Ohio Oil Company and of the agents of the plaintiffs, certain letters and communications.

The Court: We might start at nine-thirty tomorrow morning. Court will stand adjourned until nine-thirty tomorrow morning.

(5:10 p.m., December 22, 1949.) [282]

(Court resumed, pursuant to adjournment, at 9:30 o'clock a.m. on December 23, 1949, at which time all counsel were present.)

The Court: Good morning, gentlemen. You are ready to begin this morning?

Mr. McCabe: Yes, your Honor.

Mr. Everett: Yes, your Honor.

Mr. Everett: I believe Mr. Gerlough was on the stand when we closed last night and he was going to look up a couple minutes for me.

The Court: Very well.

JEAN P. GERLOUGH

Cross-Examination

(Resumed)

By Mr. Everett:

Q. Mr. Gerlough, I asked you last night if you would check the minutes of the trustees' meeting of the Inland Empire Oil and Gas Syndicate and the directors' meeting of the Potlatch Oil and Refining Company to see if you could find any reference with reference to any action being taken to notify The Ohio Oil Company or terminate the division order introduced?

A. I did not find any. I checked the minutes of the Potlatch and Inland and Troy Sweet Grass and I did not find [283] any orders revoking a division order of these companies with The Ohio Oil Company. However, I did find resolutions authorizing the execution of the division orders by the officers of the company.

Q. Then the division orders that I introduced yesterday were executed pursuant to the authori-

(Testimony of Jean P. Gerlough.)

zations as reflected by the minutes of the board of directors or trustees?

A. That is right, in the Potlatch and the Troy-Sweet Grass; however, I never found any such minutes in the Inland Empire Oil and Gas Syndicate.

Q. I hand you a letter dated October 17, 1924, and ask you to state if you recognize that?

A. I recognize the letterhead and the signature, yes.

Q. Well that letter I asked Mr. McCabe to produce it and it came from the files of Inland Empire, I believe, is that right, Mr. McCabe?

Mr. McCabe: What is that?

Mr. Everett: This letter, this came from the files of Inland Empire Oil and Gas Syndicate?

Mr. McCabe: Yes, that is right.

Q. (By Mr. Everett): Would you please state what it is?

A. Well, it is a statement that the drilling charges of a certain well were duplicated on different statements, duplication of charges. [284]

Q. I want you to state on whose letterhead the letter was written and whose signature it was? I will introduce the letter.

A. It is on the letterhead of the Inland Empire Oil and Gas Syndicate and signed by Mr. R. E. Wilson.

Q. You know Mr. Wilson's signature and that is his signature? A. That is right.

Q. This letter was with reference to Defend-

(Testimony of Jean P. Gerlough.)

ant's Exhibit N? I hadn't had it marked prior to having you testify. A. Yes.

Mr. Everett: We offer in evidence letter dated October 17th, 1924.

Mr. McCabe: No objection.

Mr. Everett: On the letterhead, Inland Empire Oil and Gas Syndicate, addressed to Mr. J. A. Harsh, Deary, Idaho, and signed by R. E. Wilson.

Mr. McCabe: We have no objection, your Honor.

The Court: It may be received. What is it about?

Mr. Everett: It is very short, your Honor, if you would like to read it.

The Court: Yes.

(Whereupon said Defendant's Exhibit N, offered and received in evidence, is a part of this record.)

Q. (By Mr. Everett): Do you know Mr. John T. O'Neil? [285] A. Yes, I do.

Q. Do you know his signature?

A. I am afraid I don't know. I know L. B. O'Neil's signature but I am afraid I don't know John O'Neil's signature.

Mr. Everett: Did I understand the Court this may be received in evidence?

The Court: Yes.

Q. (By Mr. Everett): Did you find the statements to Potlatch and Empire for the months of November, 1941, and October, 1942? Did you find those? A. Inland Empire, too.

(Testimony of Jean P. Gerlough.)

Q. This is Inland Empire?

A. One Potlatch, too. They are identical.

Q. Just referring to Plaintiffs' Exhibit A, the original statement to Inland Empire Oil and Gas Syndicate of November 30th, 1941, I will ask you to state, Mr. Gerlough, if anything different appears on this statement than had on previous statements, referring to the invitation to please examine this statement carefully?

A. Periodically these statements have that notation on them from The Ohio Oil Company auditors I think every year or every year or two the auditors who were working on Ohio Oil Company records they put this notation on the statements asking if this agreed with your records. The statement does [286] agree with our book records, yes, which were made from the statements themselves.

Q. Well there was no—you found nothing in error in your records or that your records conformed with these then?

A. Our bookkeeping—our records conformed with these statements and they do agree with the statements as far as that is concerned.

Q. I just wondered if you had noticed this invitation to examine from our auditors?

A. Yes, that same notice has appeared at various times throughout the years, notice by the auditors, Ernst and Ernst for The Ohio Oil Company.

Q. And the same appeared on the Potlatch Oil Company?

A. Yes, such routine matters as the auditors put on.

(Testimony of Jean P. Gerlough.)

Q. These are representative of that type of statement? A. Yes.

Q. These two? A. Yes.

Q. Referring also to the statement of October 31st, 1942, to Inland Empire Oil and Gas Company?

A. All we had to set up our books from where those statements and our books conformed to those statements.

Mr. Everett: That is all, Mr. Gerlough. [287]

Redirect Examination

By Mr. McCabe:

Q. Mr. Gerlough, in cross-examination by counsel for the defendant you referred to this minute book this morning of Potlatch Oil and Refining Company? A. That is correct.

Q. And in which you stated you found no minute entries showing that the division orders which were exhibited to you yesterday afternoon by counsel for the defendant had been revoked or cancelled?

A. That is right.

Q. Now did you find—I wish you would refer to the same minutes and see if you can find the minutes covering the matter of signing these division orders?

A. Yes, I have them here.

Q. What was the date of the first division order signed as indicated by your records, and I refer to the Inland Empire Oil and Gas Syndicate or the Troy or the Potlatch, either one?

A. The Inland had no record. The Potlatch is here.

(Testimony of Jean P. Gerlough.)

Q. I am referring to the minutes of the Potlatch. Just state. A. May 28, 1923.

Q. And does that set forth the minutes of that meeting? A. Yes, it does.

Q. Those minutes refer to one of the division orders [288] which was exhibited to you yesterday by counsel for the defendant?

A. That is correct.

Mr. McCabe: We ask leave to enter into the record, if your Honor please, the minutes of a meeting of the Potlatch Oil and Refining Company as identified by the witness for June 6th, 1923. These minutes refer to the resolution which specifies what form of order should be signed by them.

The Witness: Is that the correct date, Mr. McCabe?

Mr. McCabe: That is what it says at the bottom.

The Court: Is there any objection?

Mr. Everett: Well, I don't know. He hasn't made an offer of it yet.

Mr. McCabe: I can explain it very briefly, your Honor. Under the agreement that is involved in this action the Troy Sweet Grass Company had to sell all of its oil to The Ohio Oil Company. The Ohio Oil Company agreed to pay the prevailing market price and when division orders was presented it was presented of course under this contract, and in these minutes you will note that the minutes expressly refer and this language appears: "Subject to its usual regulations in relation to the payment for same," definitely referring to the usual

(Testimony of Jean P. Gerlough.)

regulations for payment of same as specified in the contract.

Mr. Everett: It doesn't say that Mr. McCabe. That is your interpretation. [289]

Mr. McCabe: It is right here if you wish to read it, Mr. Everett.

Mr. Everett: The wording is subject to its usual regulations in reference to the payment for same, and does not say anything about the contract or anything else. If you want to offer it, I will object to it.

Mr. McCabe: I may have made a mistake as to the date.

The Witness: Date of May 28th, 1923. I think you said June.

Mr. McCabe: Oh, yes, I wish to correct that. The minutes of the meeting May 28th, 1923, as shown in the minute book of the Potlatch Oil and Refining Company.

Mr. Everett: Are you going to read that into the record, Mr. McCabe?

Mr. McCabe: I thought we would just have the reporter copy it into the record.

Mr. Everett: That is all right, and my objection if there is any attempt to alter or vary the division orders which are already in evidence, I would object to it as not being, as being a preliminary matter to the execution of the division order itself; if it does not alter or vary it, I have no objection to it. I don't think, or to attack the division order at this late

(Testimony of Jean P. Gerlough.)

date to show his officers were not authorized to execute it. [290]

The Court: From your standpoint it might be construed two different ways, might it not?

Mr. Everett: I don't see that it can.

The Court: Well, we will admit it.

(Whereupon said Minutes of May 28, 1923, of Potlatch Oil & Refining Company, are in words and figures as follows, to wit:)

Record of Minutes, Directors' Meeting
(Copy)

Meeting of the Board of Directors of the Potlatch Oil & Refining Company, held in the offices of the Company at Shelby, Toole County, Montana, Monday, May 28, 1923, in accordance with notice given to all Directors of the Corporation.

Meeting called to order at four o'clock p.m. by the President, T. P. Jones.

On roll call, the following Directors were present: T. P. Jones, C. W. Craney, A. E. Douglas and J. A. Harsh; absent: W. J. Ball. The President declared a quorum present and the meeting open for the transaction of business.

The minutes of the meeting of April 6, 1923, were read and approved as read.

(Excerpt.)

Director J. A. Harsh then introduced the following resolution, to wit: [291]

(Testimony of Jean P. Gerlough.)

Resolved, That the President and Treasurer, or either of them, be and they are hereby authorized:

(1st) To execute on behalf of this Company all division orders for well interests from which oil is now, or will hereafter be delivered to The Ohio Oil Company, or upon its order; for all well interests owned by this Company, in pursuance of which all oil run from well interests owned by this Company shall become the property of The Ohio Oil Company, when delivered to said The Ohio Oil Company, or upon its order, subject to its usual regulations in relation to the payment for same;

(2nd) To collect and receive moneys due this Company for oil delivered to, or upon the order of, The Ohio Oil Company; and

(3rd) To execute assignments and transfers of well interests owned by this Company, to be filed with The Ohio Oil Company transferring such interests to others.

Motion made by J. A. Harsh, seconded by A. E. Douglas, that the resolution as read be adopted, which motion was carried by unanimous consent of all Directors present, viz: T. P. Jones, C. W. Craney, A. E. Douglas and J. A. Harsh; W. J. Ball being absent. The President declared the motion carried and the resolution so adopted.

On motion, the Directors adjourned to meet at the Davenport Hotel in the City of Spokane at ten o'clock a.m., [292] Wednesday, June 6, 1923.

T. P. JONES,
President.

(Testimony of Jean P. Gerlough.)

Attest:

J. A. HARSH,
Secretary.

(Copy—Minutes May 28, 1923.)

Q. (By Mr. McCabe): Now was there another minutes of the Potlatch Oil and Refining Company and Board of Directors referring to the other, other division orders to be signed?

A. The minutes of the Potlatch Oil and Refining Company dated February 9th, 1926, have the similar resolution incorporated into them and the same wording exactly as the previous resolution.

Q. And referring to the——

A. Referring to the division orders authorizing the officers of the corporation to execute division orders for the sale of oil to The Ohio Oil Company.

Mr. Everett: May I ask the witness a question before this goes in?

Mr. McCabe: Yes.

Q. (By Mr. Everett): Was a division order executed pursuant to this [293] authorization?

A. I didn't know the dates of the orders. We haven't the orders filed there and a copy of the order is not filed there but you had the orders introduced in evidence yesterday.

Q. I believe they were dated earlier than this action?

(Testimony of Jean P. Gerlough.)

A. You introduced a number of them. They executed these orders from time to time and I don't know whether these correspond exactly to the same orders or not.

Q. I have been unable to find the originals of some of those orders and that is why I asked you the question.

A. They were not filed with our minutes.

Q. Oh, I just ask you if it is reasonable to assume this authorization was followed up by the execution of the division order which was transmitted to The Ohio Oil Company?

A. At least it occurred at that time.

Q. At the time?

A. At that particular time, yes.

Mr. Everett: I have no objection to this.

Mr. McCabe: I would ask leave this be read and copied into the minutes.

The Court: It may be read and copied.

Mr. McCabe: And this refers to the minutes of the meeting?

The Witness: February 9th, 1926. [294]

Mr. McCabe: Of February 9th, 1926.

(Whereupon said Minutes of February 9, 1926, of the Potlatch Oil & Refining Company, are in words and figures as follows, to wit:)

Record of Minutes, Directors' Meeting
(Copy)

Meeting of the Board of Directors of the Potlatch Oil & Refining Company, held in the Davenport

Hotel in the City of Spokane, State of Washington, on Tuesday, February 9, 1926.

The meeting was called to order at nine o'clock a.m., by the President, T. P. Jones, pursuant to notice given to all Directors by the Secretary.

On roll call, the following Directors were present: T. P. Jones, W. J. Ball, C. W. Craney and J. A. Harsh; absent: B. H. Hornby. The President declared a quorum present and the meeting open for the transaction of business.

The minutes of the meeting of April 2, 1925, were then read and approved as read.

(Excerpt.)

Director J. A. Harsh then introduced the following resolution, to wit:

“Resolved, That the President and Treasurer, or either of them be, and they are hereby authorized:

“(1st) To execute on behalf of this Company all division orders for well interests from which oil is now, or will [295] hereafter be delivered to The Ohio Oil Company, or upon its order; for all well interests owned by this Company, in pursuance of which all oil run from well interests owned by this Company shall become the property of The Ohio Oil Company, when delivered to said The Ohio Oil Company, or upon its order, when delivered to said The Ohio Oil Company, or upon its order, subject to the usual regulations in relation to the payment of same;

“(2nd) To collect and receive moneys due this

(Testimony of Jean P. Gerlough.)

Company for oil delivered to, or upon the order of, The Ohio Oil Company; and

“(3rd) To execute assignments and transfers of well interests owned by this Company, to be filed with The Ohio Oil Company transferring such interests to others.”

Motion made by W. J. Ball, seconded by C. W. Craney, that the resolution as read be adopted, which motion was carried by the unanimous consent of all Directors present, viz: T. P. Jones, W. J. Ball, C. W. Craney and J. A. Harsh voting “yes”; B. H. Hornby being absent, and the President declared the motion carried and the resolution so adopted unanimously.

There being no further business, on motion the Board adjourned.

T. P. JONES,
President.

Attest:

J. A. HARSH,
Secretary. [296]

Q. (By Mr. McCabe): Now have you searched through the minutes of the company which you have presented here in court to find any other resolutions passed with reference to the signing of the division orders?

A. I have found such a resolution in the minutes of the Troy-Sweet Grass Oil Syndicate.

Q. I mean the Potlatch?

(Testimony of Jean P. Gerlough.)

A. Those are the only two references I found in the Potlatch minutes.

Mr. McCabe: If your Honor please, yesterday in the examination of this witness I thought I had covered the relations and positions of T. P. Jones with the Potlatch Oil and Refining Company and Inland Empire Oil and Gas Company, and I find in checking my notes that I did not complete that and I would ask leave to reopen my case in chief to the extent of having the witness identify the officers.

The Court: Very well, you may do so.

Q. (By Mr. McCabe): Mr. Gerlough, do you know what position Mr. T. P. Jones held with the Inland Empire Oil and Gas Syndicate between June 15th, 1922, to the time of his resignation or his vacation of the office?

A. He was a trustee. T. P. Jones was a trustee of the Inland Empire Oil and Gas Syndicate from May, 1922, until [297] the spring of 1941 when he resigned, he was a trustee.

Q. And what other official position did he hold with the Inland Empire Oil and Gas Syndicate?

A. He held no official position other than that.

Q. With respect to the Potlatch Oil and Refining Company did Mr. Jones occupy or sustain any relation to that company as an official or employee or otherwise?

A. Mr. Jones was President and General Manager of the Potlatch Oil and Refining Company from the time of its organization, I believe it was in 1923, until 1932, and I wish to correct the state-

(Testimony of Jean P. Gerlough.)

ment I made yesterday that he had resigned. In going through the minutes this morning I find that he did resign from the Inland Empire Oil and Gas Syndicate but in the Potlatch Oil and Refining Company in 1932 the stockholders elected a new board of directors and T. P. Jones was not included and he was automatically relieved as an officer and director of the corporation because of the fact that he was not chosen a director at that time.

Q. And what was the date of that meeting of the directors?

Mr. Everett: The witness has already testified in 1932.

The Witness: The meeting of the stockholders of the Potlatch Oil and Refining Company, July 14, 1932.

Q. And was he elected a director or not in that meeting? [298]

A. He was not elected a director.

(Whereupon the Minutes of May 28, 1923, of the Trustees of the Troy-Sweet Grass Oil Syndicate, are in words and figures as follows, to wit:)

(Copy)

Minutes of a meeting of the Trustees of the Troy-Sweet Grass Oil Syndicate, held in the offices of the Company at Shelby, Montana, on May 28, 1923, in accordance with a notice issued to all of the trustees of said Syndicate.

The meeting was called to order at eleven o'clock a.m. by the President, T. P. Jones.

(Testimony of Jean P. Gerlough.)

On roll call the following Trustees were present: T. P. Jones, A. E. Douglas, K. G. Luke and J. A. Harsh; absent: J. C. Campbell. The President declared a quorum present and the meeting open for the transaction of business.

The minutes of the meeting of April 6, 1923, were read and approved as read.

Moved by J. A. Harsh, seconded by A. E. Douglas, that a proxy be given to T. P. Jones to vote all of the stock held by this Syndicate in the Potlatch Oil & Refining Company at the Special Meeting of the Stockholders, or any adjournment thereof, of the Potlatch Oil & Refining Company to be held May 28, 1923, and that the Secretary be authorized to certify to said proxy and deliver same to the Secretary of the [299] Potlatch Oil & Refining Company. Motion carried, all Trustees present voting "yes."

J. A. Harsh then introduced the following resolution:

"Resolved, That the President and Treasurer, or either of them, be and they are hereby authorized:

"(1st) To execute on behalf of this Company all division orders for well interests from which oil is now, or will hereafter be delivered to The Ohio Oil Company, or upon its order; for all well interests owned by this Company, in pursuance of which all oil run from well interests owned by this Company shall become the property of The Ohio Oil Company, when delivered to said The Ohio Oil Company, or

(Testimony of Jean P. Gerlough.)

upon its order, subject to its usual regulations in relation to the payment for same;

“(2nd) To collect and receive moneys due this Company for oil delivered to, or upon the order of, The Ohio Oil Company; and

“(3rd) To execute assignments and transfers of well interests owned by this Company, to be filed with The Ohio Oil Company transferring such interests to others.”

Moved by J. A. Harsh, supported by A. E. Douglas, that the resolution as read be adopted, which motion was carried by unanimous consent of all Trustees present, viz: T. P. Jones, A. E. Douglas, K. G. Luke and J. A. Harsh; J. C. Campbell being absent. The President declared the motion [300] carried and the resolution so adopted.

On motion, the Trustees adjourned to meet at the Davenport Hotel in the City of Spokane at two o'clock p.m., Wednesday, June 6, 1923.

T. P. JONES,
President.

Attest:

J. A. HARSH,
Secretary.

Mr. McCabe: Do you have that notice to produce with you, Mr. Everett?

Mr. Everett: Yes, sir. You are referring to which one. Here is the one you filed.

Mr. McCabe: Have you the original letter dated

(Testimony of Jean P. Gerlough.)

June 8th, 1923, addressed to Mr. L. J. Yealy, Superintendent of The Ohio Oil Company, at Shelby, from the Inland Empire Oil and Gas Syndicate?

Mr. Everett: I have. Do you have the response to it?

Mr. McCabe: I don't know. I will see. Let's see. Let's get the first one.

Mr. Everett: We might simplify this considerably. We can take these letters you want, the responses I want, and [301] we can put them all in without objection. I don't want the original letters to go in without the answer to it.

Mr. McCabe: The responses you request in the notice to produce I find there is a letter of June 20, 1923, signed by J. P. Sutton, Treasurer. I don't know if that refers to this one or not. The letter I have requested is the letter of June 8th, 1923.

Mr. Everett: And I have requested the response to that letter.

Mr. McCabe: What was the date of the response? I have many letters, whether these are responses or not, if you will indicate to me the date of that response I can get it because I have all these letters in order, Mr. Everett.

Mr. Everett: I think it is item 5 in my second notice to produce original letter dated June 20th, 1923.

Mr. McCabe: I don't have that letter. Is that the letter from Mr. Sutton?

Mr. Everett: That is the letter from Mr. Sutton,

(Testimony of Jean P. Gerlough.)

yes, sir; well, if you don't have it that is all there is to that.

Mr. Donovan: They have a letter.

Mr. McCabe: The original of that, Mr. Everett, is a part of the R. B. Wilson file. I have a copy.

Mr. Everett: If this is a copy, this is satisfactory.

Mr. McCabe: Now, have you the original letter dated [302] September 11, 1923, addressed to F. E. Hurley, Vice President, with reference to the Baker lease? The date of the letter was September 11th.

Mr. Everett: I don't happen to have it.

Mr. McCabe: It was signed by R. E. Wilson.

Mr. Everett: I don't have the original. I did find, however, a copy of it in the file. Did you find the response to that one?

Mr. McCabe: And do you have——

Mr. Everett: Do you have the response to this one, letter dated September 22nd?

Mr. McCabe: What date was that?

Mr. Everett: September 22, 1923.

Mr. McCabe: That is the date?

Mr. Everett: September 22, 1923.

Mr. McCabe: From F. E. Hurley?

Mr. Everett: That is right.

Mr. McCabe: I have a copy of it. The original letter is a part of the deposition of R. E. Wilson.

Mr. Everett: This appears to be a correct copy. All right.

Mr. McCabe: Do you have the original letter dated October 3rd, 1924, addressed and mailed to

(Testimony of Jean P. Gerlough.)

The Ohio Oil Company from the Inland Empire Oil and Gas Syndicate?

Mr. Everett: We were unable to find that letter. Do [303] you have a copy of it?

Mr. McCabe: Yes, I have the copy. The original is part of the deposition of R. E. Wilson.

Mr. Everett: And do you have the response to this letter?

Mr. McCabe: Yes, just a moment, I think I have. What is the date?

Mr. Everett: I don't recall the date off hand. I didn't list them by date. All I wanted was to get the entire picture of the letters involved and the responses.

Mr. Everett: Might I suggest to the court that we take some time here. There is no need for the court to sit here and see us go through all these old letters.

The Court: You want to get together when we take a recess and find out what you want and what responses there were?

Mr. Everett: I have everything Mr. McCabe asked for. We can probably go ahead with it. He probably wants to put his case on in that order and I wouldn't want to do anything to upset that.

The Court: Go ahead. I will see. It seems to me you might have gotten together outside of court and had them ready to produce this morning; that would have saved the most time. Go ahead.

Mr. McCabe: Have you got the response to the letter—— [304]

(Testimony of Jean P. Gerlough.)

Mr. Everett: I think that is the letter of December 5, 1924, item 8 in my notice, second notice.

Mr. McCabe: Yes, I have the original. Do you have the original letter dated December 1st, 1924, addressed to J. P. Sutton, Assistant Treasurer of The Ohio Oil Company?

Mr. Everett: I was unable to find that one. Do you have a copy of it?

Mr. McCabe: Yes.

Mr. Everett: Do you have the response?

Mr. McCabe: The original response is a part of the deposition of R. E. Wilson, offered in evidence. I have a copy of it. Do you have the original letter dated January 30th, 1942, from Inland Empire Oil and Gas Syndicate to F. E. Hurley, Vice President?

Mr. Everett: We were unable to find it. Do you have a copy of it?

Mr. McCabe: Yes, I have a copy. I presume the original of that letter was introduced in evidence in the deposition of R. E. Wilson and that is a copy.

Mr. Everett: Do you have the response to that letter?

Mr. McCabe: The response to that letter is also entered as the original in the deposition of R. E. Wilson. Do you have the original letter dated January 23, 1925, addressed to The Ohio Oil Company?

Mr. Everett: We were unable to find it. Do you have [305] a copy of it?

(Testimony of Jean P. Gerlough.)

Mr. McCabe: That is Inland Empire Gas Syndicate.

Mr. Everett: The response to letter of January 23, 1925.

Mr. McCabe: I have the response letter. Do you have the original letter dated January 28, 1925, addressed to The Ohio Oil Company at Shelby, Montana?

Mr. Everett: I have. Do you have the response to it?

Mr. McCabe: I have the response to it. Attached to that was an exhibit. Do you have the original letter dated January 28th, 1925, addressed to The Ohio Oil Company at Findlay, Ohio, from the Inland Empire Oil and Gas Syndicate?

Mr. Everett: No, the letters I have are addressed to The Ohio Oil Company, Shelby, Montana. I have two of them. They are identical in wording, one from Inland Empire and Potlatch asking that office furnish them with charges and credits as they come from the field office, and do you have the responses to those letters?

Mr. McCabe: I do. Do you have the date?

Mr. Everett: They are dated February 9, 1925, and were signed by Mr. Yealy.

Mr. McCabe: February 9th?

Mr. Everett: February 9th, 1925, and were signed by Mr. Yealy. [306]

Mr. McCabe: The original of that is a part of the deposition of R. E. Wilson, but I have a copy.

(Testimony of Jean P. Gerlough.)

Mr. Everett: This is addressed to the Inland; do you have the one addressed to Potlatch?

Mr. McCabe: No, I don't have, but it is an identical letter, as I recall, with respect to the Potlatch.

Mr. Everett: Well, may it be stipulated in the record that there was an identical letter, identical in wording to the letter of February 9th, with the date line Shelby, Montana, and it was addressed to Potlatch Oil Company on the letterhead of The Ohio Oil Company and signed by L. J. Yealy?

Mr. McCabe: No, there wasn't any because the Potlatch Oil Company—that is, there was an identical letter, I recall that.

Mr. Everett: You stipulate it in the record?

Mr. McCabe: Yes, and the record may so show.

The Court: How many more of those have you got?

Mr. McCabe: I have about this many.

The Court: The Clerk can call me when you get through. I am not going to put in any more time here. Go ahead and let me know when you get through.

(Whereupon the court recessed at 10:20 o'clock a.m.)

(Court resumed, pursuant to recess, at 11:10 o'clock a.m., at which time all counsel were present). [307]

Mr. Everett: We want to mark these exhibits Plaintiffs' Exhibit O.

Mr. McCabe: Plaintiffs offer in evidence Plain-

tiffs' Exhibit O, being letters and correspondence between Plaintiffs and Defendant during the period of joint operations embracing the following letters:

Mr. Everett: Letter dated June 8, 1923, Inland Empire Oil and Gas Syndicate to Mr. Yealy, Superintendent, Ohio Oil company.

Letter of June 20th, 1923, addressed to Inland Empire Oil and Gas Syndicate from The Ohio Oil Company.

The next is letter dated September 11, 1923, from Inland Empire Oil and Gas Syndicate to Mr. F. E. Hurley, Vice President, Ohio Oil Company.

Next is letter dated September 22nd, 1923, addressed to Mr. R. E. Wilson, President, Inland Empire Oil and Gas Syndicate from The Ohio Oil Company, signed F. E. Hurley.

Letter dated October 3rd, 1924, addressed to The Ohio Oil Company by Inland Empire Oil and Gas Syndicate.

Letter dated October 8th, 1924, addressed to Inland Empire Oil and Gas Syndicate by J. S. [308] Sutton.

Letter dated December 1, 1924 addressed to The Ohio Oil Company by Inland Oil and Gas Syndicate.

Letter of December 5, 1924, addressed to Inland Oil and Gas Company by The Ohio Oil Company.

Letter of January 30, 1924, addressed to F. E. Hurley, Vice President, Ohio Oil Company, from Inland Empire Oil and Gas.

Letter dated January 23, 1925, addressed to The Ohio Oil Company from R. E. Wilson, President.

Letter dated January 28, 1925, addressed to The Ohio Oil Company by Inland Empire Oil and Gas Syndicate by R. E. Wilson.

Letter dated January 28, 1925, addressed to The Ohio Oil Company from the Potlatch Oil and Refining Company.

Letter dated February 9, 1925, addressed to Inland Empire Oil and Gas Syndicate from L. J. Yealy.

Letter dated January 28, 1925, addressed to Potlatch Oil and Refining Company from The Ohio Oil Company.

Letter dated January 28, 1925, addressed to The Ohio Oil Company from Inland Empire Oil and Gas Syndicate with schedule two pages attached.

Letter dated January 28, 1925, addressed to The Ohio Oil Company from Potlatch Oil and Refining Company.

Letter dated February 3, 1925, addressed to Inland Empire Oil and Gas Syndicate from The Ohio Oil Company. [309]

Letter dated February 9th, 1925, to The Ohio Oil Company from Inland Empire Oil and Gas Syndicate, with schedule labled "Tanks" attached.

Letter dated February 17, 1925, to Inland Empire Oil and Gas Syndicate from The Ohio Oil Company.

Letter dated May 11, 1925, to The Ohio Oil Company from Inland Empire Oil and Gas Syndicate.

Letter dated May 28, 1925, to R. E. Wilson, President, Inland Empire Oil and Gas Syndicate from The Ohio Oil Company.

Letter dated July 17, 1925, to The Ohio Oil Company from Freeman, Thelen and Frary.

Letter dated July 21, 1925, to Freeman, Thelen and Frary by Merle N. Poe, General Counsel, The Ohio Oil Company.

Letter dated October 9, 1924, to Potlatch Oil and Refining Company from The Ohio Oil Company.

Letter dated January 15, 1941, to Potlatch Oil and Refining Company from The Ohio Oil Company.

Letter dated January 14, 1941, to Potlatch Oil and Refining Company from The Ohio Oil Company.

Letter dated January 9, 1941, to The Ohio Oil Company from Potlatch Oil and Refining Company, Inland Empire Oil and Gas Syndicate.

Letter dated December 3, 1938, to The Ohio [310] Oil from Potlatch Oil and Refining Company.

Letter dated December 21, 1938, to Potlatch Oil and Refining Company from The Ohio Oil Company.

Letter dated January 28, 1938, to The Ohio Oil Company from Potlatch Oil and Refining Company and Inland Empire Oil and Gas Syndicate.

Letter dated February 17, 1938, to Potlatch Oil and Refining Company from The Ohio Oil Company.

Letter dated June 1, 1936, to Jean B. Gerlough, from The Ohio Oil Company.

Letter dated June 9, 1936, to Mr. L. M. Kiplin-

ger, from Potlatch Oil and Refining Company and Inland Empire Oil and Gas Syndicate.

Letter dated July 1st, 1936, to Mr. Jean P. Gerlough, Treasurer, from The Ohio Oil Company.

Letter dated May 20, 1936, addressed to The Ohio Oil Company from Potlatch Oil and Refining Company and the Inland Empire Oil and Gas Syndicate.

Letter dated January 7, 1936, to The Ohio Oil Company from Potlatch Oil and Refining Company.

Letter dated January 11, 1937, to Potlatch Oil and Refining Company from The Ohio Oil Company.

Letter dated December 30, 1935, to The Ohio Oil Company from Potlatch Oil and Refining Company.

Letter dated January 6, 1936, to Potlatch [311] Oil and Refining Company from The Ohio Oil Company.

Letter dated January 24th, 1936, to Potlatch Oil and Refining Company from The Ohio Oil Company.

Letter dated January 30th, 1934, to The Ohio Oil Company from Potlatch Oil and Refining Company.

Letter dated July 19th, 1933, to The Ohio Oil Company from Potlatch Oil and Refining Company.

Letter dated July 24, 1933, to Potlatch Oil and Refining Company from The Ohio Oil Company.

Mr. Everett: The above constitute all of Plaintiffs' Exhibit O.

JEAN P. GERLOUGH

resumed the stand and testified as follows:

Redirect Examination

By Mr. McCabe:

At this time, if your Honor please, the Plaintiffs offer in evidence Plaintiffs' Exhibit O, consisting of letters and correspondence between the Plaintiffs and the Defendant, covering periods during which the Defendant was operating the properties under the agreement of June 15th, 1922, involved in this action.

Mr. Everett: There is no objection. We have already identified them in the record.

The Court: All right, they may be received in evidence. [312]

(Whereupon said Plaintiffs' Exhibit O, consisting of correspondence, offered and received in evidence, is in words and figures as follows, to wit:) [313]

(Testimony of Jean P. Gerlough.)

PLAINTIFFS' EXHIBIT O

Inland Empire Oil & Gas Syndicate
A Common Law Trust
Shelby, Montana.

June 8, 1923.

Mr. Lee Yealey, Supt.,
Ohio Oil Company,
Shelby, Montana.

Dear Sir:

Calling your attention to the Baker lease ie., the SW $\frac{1}{4}$ Section 3 and the SE $\frac{1}{4}$ Section 4-35-2W in which the Inland Empire Oil & Gas Syndicate has an equal interest with the Troy-Sweetgrass Syndicate under the working agreement with your company.

Heretofore, the costs of operation on this lease have been made from your office at Findlay, Ohio, to the Troy-Sweetgrass Syndicate. In that we have access to these statements only at the convenience of the Troy-Sweetgrass Syndicate, and in view of the fact that these statements include the costs of operation on the Hannon and Sindon leases in which we have no interest, and furthermore, that some items such as fuel oil credits, interest on money advanced, etc., are combined in such a way as to make our share very difficult to segregate so that we have not yet been able to determine accurately our proportion of the costs, we are asking you to arrange to have a separate statement sent to us

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

covering our one-half of the 45% interest in the lease. If required by your company we will furnish you with an abstract.

We will appreciate your immediate attention in this matter as you will readily see that we are in need of this [314] statement from the fact that this office does not know how much oil, if any, has been sold, nor what the cost of operations beginning last October has amounted to.

Very truly yours,

INLAND EMPIRE OIL & GAS
SYNDICATE,

By /s/ R. E. WILSON,
Pres.-Mgr. [315]

Plaintiffs' Exhibit 5

The Ohio Oil Company
Findlay, Ohio

Producing Department,
J. P. Sutton, Asst. Treas.

June 20, 1923.

Inland Empire Oil & Gas Syndicate,
Shelby, Montana.

Attention: R. E. Wilson, President.

Gentlemen:

We have your letter addressed to Mr. Lee Yealey, requesting separate statements covering cost of operation, Baker lease.

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

We wish to advise that beginning with May business we will render you a statement covering your interest in this lease.

We will continue to forward these statements to you monthly.

Yours truly,

/s/ J. P. SUTTON,

Assistant Treasurer.

HHW:EN [316]

Inland Empire Oil & Gas Syndicate

Shelby, Montana

Sept. 11, 1923.

Mr. F. E. Hurley, Vice-President,
Ohio Oil Company,
Findlay, Ohio.

I. H. Baker lease, SW $\frac{1}{4}$ Sec 3 & SE $\frac{1}{4}$ Sec.
4. Twp. 35N., Rge. 2W. M.M., Toole County,
Montana.

Dear Mr. Hurley:

Calling your attention to the working agreement on the I. H. Baker lease entered into by yourself for the Ohio Oil Company and Mr. T. P. Jones for the Troy Sweetgrass Oil Syndicate, and the subsequent agreement with the Inland Empire Oil & Gas Syndicate covering 22 $\frac{1}{2}$ % of that lease.

In the statements we are getting from the Ohio

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Oil Co. from Findlay, Ohio, charges are being entered against the lease which do not, as we understand and interpret the working agreement, conform to the agreement as made by yourself and Mr. Jones.

Our understanding of the agreement as stated to your Mr. McFadyen and Mr. Sellery, who advised us to take the matter up with you, is, that only "actual" costs of materials, cost of development, and costs of production should be charged against the lease with an additional 8% interest charge on all money so advanced for the interest or share of the Inland Empire Oil & Gas Syndicate.

The charges for "overhead expenses," "depreciation and automobiles," "work on roads off the lease," and finally [317] "investment and expense—service department," the latter being a part of the cost of building and maintaining the main Swayze Camp from which Ohio Co. operations in this field, and even operations outside of this field are being conducted, are not consistent with our understanding of the terms of the agreement and do not conform to the agreement as written, which states: "The party of the second part hereby agrees to render the party of the first part monthly statements showing the actual costs of expenses of developing and operating said land, etc.

The statements we have received up to and including June 30th, first "cover all actual costs on the lease, including foreman hire, upkeep on field

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

autos, all trucking and labor charges, the latter being charged against the lease at the full price paid by the Ohio Oil Co. including board and room to men. To the cost of material is added a charge covering the cost of handling through the warehouse, "these are all legitimate charges." Then the statements go on with charges such as depreciation on foreman's autos, work on roads off the lease and part of the cost of building the Swayze camp, the three latter charges are unquestionably overhead charges. To this total is added an overhead charge of 10% with an 8% interest charge on the full total. Thus we are charged doubly on a part of the overhead with an interest charge on the double charge. [318]

The charges mentioned in the paragraph second above, are in our opinion, no more a reasonable charge against the least than would be our own overhead expenses. We are as yet paying our overhead from our Capital, expecting later to be reimbursed when we realize a profit from our interest in the Baker lease, and cannot see but that the Ohio Oil Co. should stand its own overhead expense and take its reimbursement from its 55% interest in the lease.

We are writing you who made the contract with Mr. Jones asking that you take the matter up with your Company and see that the agreement is car-

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued):

ried in the spirit and intention in which it was made.

Very truly yours,

INLAND EMPIRE OIL & GAS
SYNDICATE,

By /s/ R. E. WILSON,
President.

REW/LN [319]

Plaintiff's Exhibit 7

The Ohio Oil Co.
Findlay, Ohio

September 22, 1923.

Mr. R. E. Wilson, President,
Inland Empire Oil & Gas Syndicate,
Shelby, Montana.

Dear Mr. Wilson:

I beg to acknowledge receipt of your letter of September 11th in which you call attention to the working agreement on the I. H. Baker lease entered into by the Ohio Oil Company at the Troy Sweetgrass Oil Syndicate and the subsequent agreement with the Inland Empire Oil & Gas Syndicate, voering 22½% of that lease.

I am confident that you are laboring under a misapprehension as to the charges that are being entered against your interest in this lease as, after having investigated the matter, I think all of these

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

charges are being made in accordance with that agreement. We are charging you only with actual cost of development and expenses but many of these costs, while actual, are not direct. That is to say, these expenditures are for the benefit of all the leases and these indirect charges are distributed and included as overhead. An overhead charge is just as legitimate as any other actual charge that should be made against the lease. For example, the District Foreman's time is not charged exclusively to one lease. Therefore, a part of his time and expenses become a part of the cost of [320] production on the Baker lease. It is not charged direct but is included in the 10% overhead. It will take no argument to convince you that a foreman's time does come within the meaning of an actual charge as his services could not possibly be dispensed with. Some of the other items included in the overhead and not direct charges are office salaries, stationery, printing, office rent, light, etc. In connection with the 10% overhead you speak about the 8% interest charge. These two charges have no connection whatever. The interest charge is made, as the agreement provides, for development funds which we advance and for which we are to be reimbursed out of the oil plus 8% on the amount so advanced until it is paid. If you want to dispense with that 8% charge we would be very glad to have you pay currently your proportion of the develop-

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

ment and operating costs and if you care to do this you will please so advise us.

As to the "Investment and Expense—Service Department" charges, these also cover items which are indispensable to the operation of the lease. Unless we built camps and equipment to take care of the men and material it would be impossible out in that country to drill and develop any leases. Instead of building a single camp exclusively on the Baker lease for the operation of that lease we built a general camp to take care of a number of leases and the cost and expense and income of this camp is divided between the several interests in the farms receiving the benefit of the camp. Your proportion is 3.1032%. This is very [321] much cheaper than if we had built a camp on the Baker farm to serve that lease alone. If you are at all acquainted with operations generally over the Rocky Mountain region you will understand that these camps are absolutely necessary and it is the general practice to build large camps to take care of a number of leases. The matter of road-building and the use of automobiles and trucks and all these items come properly within charges that should be made against the lease.

You could hardly expect our company to buy all this equipment and use it for the benefit of a lease and still not make any charge. I have looked up the charges of overhead against the operation of the Baker lease and I am sure that were you to

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

put an organization on to develop and operate that lease as we have done that it could not have been done as efficiently and as cheaply as we have done it. I think our charges are entirely reasonable and ought not to receive any complaints from your company. You speak about having your own overhead. I cannot quite see what that overhead would be as you are taking no part whatever in the work connected with developing the leases and all you have to do is to take a few moments each month to examine our statements. We are furnishing all the funds and taking all the risk and making charges which we think are entirely fair.

Trusting this explanation will be satisfactory to you, I remain.

Yours very truly,

/s/ F. E. HURLEY.

FEH:W [322]

Plaintiff's Exhibit 8

Oct. 3, 1924.

The Ohio Oil Co.

Findlay, Ohio.

Gentlemen:

You will please give your early attention to the following errors in your statements to us covering the Irving H. Baker lease.

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

June statement—your bill No. W 3927,		
1,920.07 bbls oil @ \$1.05.....	\$1,920.07	
Should be.....	2,016.07	
Balance Due		\$ 96.00
July Statement—your bill No. W 4035,		
Drilling charges Irving H. Baker Well		
No. 9, 1710' 6" @ 3.00.....	\$1,154.49	
This drilling charge is duplicated in your August statement.		
August Statement—your bill No. W 4140		
Drilling charges Irving H. Baker Well		
No. 9, 1710' 6" @ \$3.00.....	\$1,154.59	
Your over-charges are: Drilling.....	\$1,154.59	
10% Overhead.....	115.45	\$1,270.04
		<hr/>
Unpaid balance on above errors.....		\$1,366.04

Very truly yours,

INLAND EMPIRE OIL & GAS
SYNDICATE.

.....,

President.

CC to: Casper

Shelby [323]

The Ohio Oil Co.

Findlay, Ohio

Producing Department,

J. P. Sutton, Asst. Treas.

October 8, 1924.

Inland Empire Oil & Gas Syndicate,

Shelby, Montana.

Gentlemen:

Referring to your letter of October 3 in which
you call attention to apparent discrepancies on our

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

invoice as covering I. H. Baker lease, we wish to advise that the oil on our June statement #W 3927 should have read 1828.64 Barrels at \$1.05 instead of 1920.07 Barrels at \$1.05.

We wish to advise that the drilling charges for I. H. Baker Well #9 on our August Bill #W 4140 was a duplication of the drilling charges shown on our Bill #W 4035, and that this error will be corrected on our September statement.

Yours truly,

/s/ J. P. SUTTON,

Assistant Treasurer.

HHW:EN [324]

Plaintiff's Exhibit 9

Dec. 1, 1924.

Mr. J. P. Sutton, Ass't Treas.,
The Ohio Oil Company,
Findlay, Ohio.

Dear Mr. Sutton:

Your attention is called to your bill W-4283, dated September 30th, 1924. The Ohio Oil Company to the Inland Empire Oil & Gas Syndicate.

1,759.27 Bbls. of oil @ .90c.....\$1,421.34

Should be.....\$1,583.34

Very truly yours,

President. [325]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit 10

The Ohio Oil Co.

Findlay, Ohio

December 5, 1924.

Producing Department,
J. P. Sutton, Asst. Treas.
Inland Empire Oil & Gas Co.,
Shelby, Montana.

Gentlemen:

We wish to acknowledge receipt of your letter of December 1, in which you called our attention to the extension of oil credits shown on our bill W-4283, dated September 30, 1924.

We wish to advise that this bill should have read 1579.27 barrels @ 90c, instead of 1759.27 barrels @ 90c.

Yours very truly,

/s/ J. P. SUTTON,

Assistant Treasurer.

HHW:MR [326]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit 11

Jan. 30, 1924.

Mr. F. E. Hurley, Vice-President,
The Ohio Oil Co.,
Findlay, Ohio.

Dear Mr. Hurley:

In making up our income tax returns and placing valuations for future returns, we are "in so far as we are able to ascertain from the advise of our attorneys and the several federal agents from whom we have got an opinion," entitled to the privilege given by the Government, of placing a revaluation for future income tax return purposes, on our interest in the Baker lease, or that part of it which would come within the 160 acres that would be allowed as a discovery.

In the case of the Baker lease "ie" the SW $\frac{1}{4}$ of Sec-3. SE $\frac{1}{4}$ of Sec-4. Twp 35-N-R-2-W, MM. Toole County, Montana, our understanding is that the bringing in of the Mid-Northern well #1 in Sept. 1922, would be allowable as a discovery well, and this well as an off-set to the Baker lease would establish approximately 80 acres or the S $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Sec-4 as within the discovery area, and those holding an interest in the 80 acres prior to the bringing in of the discovery well are permitted by the Government to set up a revaluation for future income purposes.

In anticipation that the Baker lease may in the

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

future pay goodly returns, we want to take advantage of any privileges the Government may grant. If we are correctly informed as to [327] the above, your Company undoubtedly has, or will, take advantage of it, and we are asking if you will—to advise us what valuation on your Company has placed on this land, that we may turn in the same valuation.

This will not require detail or clerical work, if your Company has revalued the land; just the amount of the revaluation, so that we may arrive at a valuation on our proportion of the lease that will conform to your valuation. In making our return we will “with your permission” sight the Government to the Ohio Oil Co.’s valuation in meeting their requirements as to how we arrived at a valuation on the lease.

Very truly yours,

INLAND EMPIRE OIL & GAS
SYNDICATE,

By.....,
President. [328]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit 13

January 23, 1925.

The Ohio Oil Company,
Findlay, Ohio.

Dear Sirs:

In your November statement, Bill No. W4581, you have the following entry: "In full for 1924 taxes on Royalties, I. H. Baker, 30 acres in Secs. 3 and 4, 35-2, \$76,714.00 @ 48.4 mills, 3,712.96," on which you charge us 22½%, or \$835.41.

We find from the records of the Toole County Treasurer that the State Board of Equalization certified to said County Treasurer from returns made by you to the State Board of Equalization on Net Proceeds of oil from the Baker farm as follows:

Ohio Oil Company.....	\$76,713.38
Potlatch Oil & Refining Co.....	17,913.38
Inland Empire Oil & Gas Synd..	37,233.86

We have been assessed on the above return of \$37,233.86 @ 48.4 mills the sum of \$1,802.14, and now you charge us an additional amount of \$835.41.

We are unable to fathom how you can charge us 22½% of your own net income tax, and desire an explanation.

Neither are we able to figure how you can make a return for us as to our net income, as we have a capital investment in the lease and you do not. We

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

presumed this was a matter for us to attend to ourselves.

Very truly yours,

R. E. WILSON,
President. [329]

Inland Empire Oil & Gas Syndicate
A Common Law Trust
Shelby, Montana

Jan. 28, 1925.

The Ohio Oil Company,
Shelby, Montana.

Gentlemen:

Please furnish us with a copy of the charges and credits against the Baker lease, as they come from your field office. Please start these copies from Jan. 1, 1925.

Very truly yours,

INLAND EMPIRE OIL & GAS
SYNDICATE,

/s/ R. E. WILSON,
President. [330]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Potlatch Oil & Refining Company
A Corporation

Offices: First National Bank Building

T. P. Jones, President

J. A. Harsh, Secretary

Directors:

W. J. Ball,
C. W. Craney,
A. E. Douglas,
J. A. Harsh,
T. P. Jones.

Shelby, Montana,
Jan. 28, 1925.

The Ohio Oil Company,
Shelby, Montana.

Gentlemen:

Please furnish us with a copy of the charges and credits, as they come from your field office, against the leases in which we are jointly interested with the Ohio Oil Company. Please start these copies from Jan. 1, 1925.

Very truly yours,

POTLATCH OIL & REFINING
COMPANY,

/s/ T. P. JONES,
President. [331]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit 15

The Ohio Oil Co.

Shelby, Montana

February 9, 1925.

Inland Empire Oil & Gas Syndicate,
Shelby, Montana.

Mr. R. E. Wilson.

Gentlemen:

Your letter of January 28th, received, asking us for a copy of our field charges and credits against the Baker lease.

I believe that Findlay issues you a statement on about the first of every month, of all, of this business that is done on the lease. If we were to make you a copy of all the transfers that are made, it would necessitate the aid of another bookkeeper in our Shelby Office. And we are trying to avoid all unnecessary expenses that we can.

As we do not make the pricing of the material in this Office, I do not think it would be of much assistance to you. If you would stop in the Office some time when it is convenient to you we will explain how we handle this business. Also at any time you wish to examine any of the transfers you are at perfect liberty to do so.

Hoping this will be satisfactory to you, I remain,

Yours very truly,

/s/ L. J. YEALY. [332]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

The Ohio Oil Co.

Findlay, Ohio

January 28, 1925.

Producing Department,
J. P. Sutton, Asst. Treas.
Potlatch Oil & Refining Co.,
Shelby, Montana.

Gentlemen: Attention J. A. Harsh, Sec'y. Treas.

We have your letter of January 23, in which you advise that you have paid taxes in the amount of \$867.02 on an assessment of \$17,913.38, representing your portion of the net proceeds from the Irvin H. Baker farm. We wish to advise that the assessment of \$76,713.38 covered the 100% of the net proceeds from the I. H. Baker farm; and the payment which you have made is a duplication of the payment made by the Ohio Oil Company.

We have, therefore, requested the State of Montana to refund us \$867.02, covering the amount of taxes which you have paid for your portion of the net proceeds on the Irvin H. Baker farm. As soon as we receive a reply from the State, we will advise you accordingly.

Yours very truly,

/s/ J. P. SUTTON,

Assistant Treasurer.

HHw:MR [333]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit 18

Jan. 28, 1925.

The Ohio Oil Company,
Findlay, Ohio.

Gentlemen:

We are enclosing a summary sheet of the charges and credits taken from your statements to us covering the costs of I. H. Baker Well #I. Sec-4. 35-2W. This well was drilled as a free well to the Inland Empire Oil & Gas Syndicate, and the Potlatch Oil & Refining Co., in lieu of the drilling by the Ohio Oil Company of a free well on the Heskin lease in Sec. 25-36-2W.

We have listed the items charged and for which there is no credit in your statement of September, 1923, and have also listed the credits given in your statement of September, 1923, for which we find no charges.

The balance due us from the well #1. account as checked from your statements is \$1,346.30.

Very truly yours,

INLAND EMPIRE OIL & GAS
SYNDICATE,

President. [334]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit 18-A

I. H. Baker Well # 1. Sec-4 35-2W Ohio Oil Co: Statements.

Items charged and not credited:

October, 1922	Gross	22½%
140' of 8" Casing @1.54.....	215.60	48.51
Small fittings.....	17.64	3.97
1 250 Bbl Tank.....	258.50	58.16
1334'4" of 2" Gas line pipe @ .20.....	266.87	
2449'5" of 2" Gas line pipe @ .15.....	412.03	152.75
	<hr/> 1,170.64	<hr/> 263.39

January, 1923

Trucking: Gasing and Tubing.....	98.00	22.08
Labor at Tanks.....	12.00	2.70
	<hr/> 110.00	<hr/> 24.78

April, 1923

Drilling 1682' 2.00.....	2,364.00	
(Note error of \$1,000 on Gross)		
Clean, Swab, and run Casing 7 days.....	217.00	805.72
(Note 22½% is charged on 3,581.00).....	2,581.00	805.72

Items credited for which no charges can be found:

September, 1923—Bill—W2985

Trucking Miscel-Rig	108.50	24.21
Trucking Forge House	35.00	7.87
Trucking Water	10.50	2.37
Trucking Miscel	49.00	11.03
Trucking Tubing	35.00	7.87
Trucking Casing	14.00	3.15
10'8" of 8½" Casing @ 1.31.....	23.69	5.33
	<hr/> 275.69	<hr/> 61.83

Items charged and not credited

(Not included above)

November, 1922

Small fittings	2.63	.59
21'5" of 6½" casing @ 1.14.....	24.42	5.50
Laying pipe line #1 ½ da @ 4.00.....	2.00	.45
	<hr/> 29.05	<hr/> 6.14

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

	Gross	22½%
October, 1922, charges on our 22½% interest....	263.39	
10% overhead.....	26.34	
8% interest Nov. 1, 1922 to Feb. 1, 1925.....	52.14	341.87
November, 1922.....	29.05	
8% interest Dec. 1, 1922.....	5.75	
10% overhead.....	2.90	37.70
January, 1923.....	24.78	
10% overhead.....	2.48	
8% interest Feb. 1, 1923, to 2/1/1925.....	4.36	31.62
April, 1923	805.72	
10% overhead.....	80.57	
8% interest May 1, 1923 to 2/1/1925.....	124.08	1,010.37

Sheet #2

I. H. Baker Well #1. Sec-4. 35-2W	Gross	22½%
October, 1922, Total charges.....	341.87	
November, 1922, Total charges.....	37.70	
January, 1923, Total charges.....	31.62	
April, 1923, Total charges.....	1,010.37	
	1,421.56	
September, 1923, credits on our 22½% int.....	61.83	
10% overhead.....	6.18	
8% interest 10/1/1923 to 2/1/1925.....	7.25	75.26
Chgd to Ohio Oil Co. Acct, Acct. Baker Well #1.....		1,346.30

Plaintiff's Exhibit 19

Jan. 28, 1925.

The Ohio Oil Company,
Findlay, Ohio.

Gentlemen:

We are enclosing a summary sheet of the charges and credits taken from your statements to us covering the costs of I. H. Baker Well #I. Sec-4. 35-2W. This well was drilled as a free well to the Potlatch Oil & Refining Company and the Inland Empire

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Oil & Gas Syndicate, in lieu of the drilling by the Ohio Oil Company of a free well on the Heskin lease in Sec-25, 36-2W.

We have listed the items charged and for which there is no credit in your statement of September, 1923, and have also listed the credits given in your statement of September, 1923, for which we find no charges.

The balance due us from the well #I. account as checked from your statements is \$1,346.30.

Very truly yours,

POTLATCH OIL & REFINING
COMPANY,

President. [337]

Plaintiff's Exhibit 20

The Ohio Oil Co.
Findlay, Ohio

February 3, 1925.

Producing Department,
J. P. Sutton, Asst. Treas.
Inland Empire Oil & Gas Syndicate,
Shelby, Montana.

Attention: R. E. Wilson, President.

Gentlemen:

We acknowledge receipt of your letter of January 28, in which you enclosed a statement in the amount

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

of \$1,346.30 which you advise is the balance due for Well #1 on the Irvin H. Baker farm. Referring to this statement, we wish to make the following explanation for each item shown on same.

October 1922—The 140' of 8 $\frac{1}{4}$ " Casing is charged to the I. H. Baker Water Well instead of I. H. Baker Well #1. The small fittings, 1-250 barrel tank, the 1334'4" of 2" Gas line pipe and 2449'5" of 2" gas line pipe is surface equipment on this farm, which is a proper charge to your account, as, according to the contract. The Ohio Oil Company was to only stand the cost of drilling and furnish casing necessary to drill this well to the first productive sand.

January 1923—Trucking Casing and Tubing. We wish to advise that this charge was reversed on our September, 1923, statement. Labor on Tanks—This is a surface equipment charge and therefore a legitimate charge to your account.

April, 1923—The charge to Well #1 for drilling 1682' shown on our statement was a typographical error. This drilling [338] should have been charged to Well #3. The \$1,000.00 error in gross was another typographical error on this statement. Our charge, then of 22 $\frac{1}{2}$ % of \$3,581.00 as shown on this statement was correct.

September, 1923—The charge for the credits listed on your statement will be found on our bills as follows:

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Trucking Miscellaneous Rig. Oct., 1923 Bill
Trucking Forge House. Oct., 1922 Bill
Trucking Water. Jan., 1923 Bill
Trucking Miscellaneous. Jan., 1923 Bill
Trucking Tubing. Jan., 1923 Bill
Trucking Basing. Jan., 1923 Bill
10'8" of 8¼ Casing. Jan., 1923 Bill

November, 1922—The small fittings is a surface equipment charge; the 21'5" of 65/8" casing is charged to the stock account on the farm, which are legitimate charges to your account. The charge for laying pipe line, 1½ days at \$4.00 per day was reversed on our September, 1923, statement.

Yours very truly,

/s/ J. P. SUTTON,

Assistant Treasurer.

HHW :MR [339]

Plaintiff's Exhibit 21

Feb. 9, 1925.

The Ohio Oil Company,
Findlay, Ohio.

Attention J. P. Sutton, Ass't Treas.

Gentlemen:

We are in receipt of your letter of February 3, covering our statement as a balance due on Well #1 on the Irving H. Baker farm. The items in the order as listed by you are as follows:

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

October, 1922—The 140' of 8" casing, we have credited this on the Well #1 account and have charged it to the Water Well. The 1334'4" and 2449'5" of 2" line pipe, small fittings, and 1-250 barrel tank used in connection with the drilling of Well #1 we are leaving as a charge against the Well #1 account, in addition to this 2" line pipe there is 14912' of 2" line pipe charged to the lease from which a credit is due. The tank and small fittings were used in the drilling of Well #1. We are attaching a statement of the Tank account which will show you the standing of that account. In connection with the line-pipe account we find on the Potlatch Oil & Refining Companies statement from the Ohio Oil Co. under date of November 29, 1924—Bill No. W-4575—a charge for oil line labor of \$8.50 and a credit for 4778' of 3" water line that is not entered on the statement to us.

January, 1923. Trucking Casing and Tubing, we wish to advise that we have not yet found where this charge is reversed [340] on the September, 1923, statement. Labor on Tanks—is charged in your statement to Well #1.

April 23—The charges and credits for drilling Wells #1 and #3 appear on your statements as follows:

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Well #1 Jan., 1923, Clean out Pull & Run		
Casing & Tubing 20 days @ 50.00.....	1,000.00	225.00
Well #1 Jan., 1923, Drilling—Sonhio tools		
1848' @2.00	3,697.00	831.83
Well #1 Apr., 1923, Drilling 1682' @ 2.00.....	2,364.00	
Well #1 Apr., 1923, P & R Casing etc.....	217.00	805.72
Well #1 July, 1923, Drilling 1698'6" @ 2.00....	3,397.00	764.33
Well #1 Credits:		
Sept., 1923, P&R Casing 20 days @ 50.00.....	1,000.00	225.00
Sept., 1923, Drilling 1848' @ 2.00.....	3,697.00	831.82
Sept., 1923, Drilling 1698'6"	3,397.00	764.33
Well #3 Charged:		
Mar., 1923, P&R Casing etc.....	350.00	
Mar., 1923, Drilling 1682' @ 2.00.....	3,364.00	835.65

In April, 1923, you have 1682' of drilling charge against Well #1, with a charge of \$217.00 for pulling and running casing, according to your letter this should have been charged to Well #3, your March, 1923, statement shows a charge against Well #3 for drilling 1682' with a charge of \$350.00 for pulling and running casing.

September, 1923—Items we credited for which we had found no charge. Trucking Miscellaneous, we find a credit for this but no charge and are leaving it as a credit to Well [341] #1 account. Trucking Tubing and Casing, we had this charged in error to Well #2, and have found offsetting charges for Trucking Miscel and Forge house. Trucking water is charged on your statement to Well #2. We note that the 10'8" of 8" Casing and 21'5" of 65/8" Casing is charged to the farm stock account.

Very truly yours,

President. [342]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit 21-A

I. H. Baker Farm—Tanks						Balance of Tanks on Lease
January 1923	6	250 BB1 Tanks Charged.....				6
February "	1	" " " "				7
March "	1	" " " "				8
April "	4	" " " "				12
May "	8	" " " "				
May "	1	" " " " Credited.....				19
June "	2	" " " "				17
July "	3	" " " " Charged.....				20
July "	4	" " " " Credited.....				16
August "	8	" " " " Charged.....				
August "	1	" " " " Credited.....				23
September "	1	" " " " Charged.....				24
October "	2	" " " "				26
May 1924	1	" " " " Credited.....				25
June "	2	" " " "				23
July "	3	" " " "				20
August "	1	" " " "				19
October "	1	" " " "				18
November "	1	" " " "				17

1—250 BB1 Tank charged to Well #1 in November, 1922, not included in the above. Total—18 tanks. Tanks on lease April 10, 1924—20. Charged to lease 27.

Tanks on lease May 24, 1924—16. Charged to lease 26. [343]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit 22

The Ohio Oil Co.

Findlay, Ohio

Producing Department,
J. P. Sutton, Asst. Treas.

February 17, 1925.

Inland Empire Oil & Gas Syndicate,
Shelby, Montana.

Attention: R. E. Wilson, President.

Gentlemen:

Replying to your letter of February 9th, which is in reply to our letter of February 3rd, we wish to advise as follows:

The charge for oil line labor and the credit for 3" water line pipe shown on our bill W-4775, dated November 29, 1924, against the Potlatch Oil & Refining Company are charged and credited to the I. Sindon Farm. On account of you having no interest in this farm this charge and credit were not shown on your statement.

For the following credits shown on our bill W-2985, dated September, 1923, Miscellaneous Trucking—\$49.00; Trucking on Tubing—\$35.00—Trucking on Casing—\$14.00, you will find the charges listed on our bill W-2369, dated January 31, 1923, against the Troy-Sweetgrass Oil Syndicate, under Cost of Wells page #2 as follows:

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Pipe Teaming & Trucking I. H. Baker—8¼"—Well #1	
Hauling Pipe, 4 hrs. @ \$3.50.....	\$14.00
Hauling Tubing.....	35.00
Miscellaneous Teaming & Trucking—Well #3	
Hauling manure for head line, 10 hrs. @ \$3.50.....	\$35.00
Hauling junk casing to Camp, 4 hrs. @ \$3.50.....	14.00
Total	<u>\$49.00</u>

In regard to the drilling charges for Well #3, we wish [344] to advise that the following charges on our March statement covered charges for use of our Drilling Tools:

Pulling and Running Casing, etc.....	\$ 350.00
Drilling 1682' @ \$2.00.....	3,364.00

and the following charge to Well #3 on our April statement covers the amount of money paid the labor contractor for drilling this well:

Drilling 1682' @ \$2.00.....	\$3,364.00
Pulling and Running Casing.....	217.00

In regard to the Tank statement which you attached to your letter, we wish to advise that according to our inventory for Tanks on this farm December 31, 1924, this report shows that there are 18 Tanks in use on this farm which agrees with the total number of tanks charged to your account as per your statement.

Yours very truly,

/s/ J. P. SUTTON,

Assistant Treasurer.

HHW:MR [345]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Plaintiff's Exhibit No. 23

May 11, 1925.

Ohio Oil Company,
Findlay, Ohio.

Gentlemen:

On the first of this month we received your March statement covering our interest in the Irving H. Baker lease, your check for the credit balance shown was not enclosed with the statement.

Kindly look this up, and if the check has been mailed please have it traced from your office.

Very truly yours,

INLAND EMPIRE OIL & GAS
SYNDICATE,

President. [346]

Plaintiff's Exhibit 24

The Ohio Oil Co.
Findlay, Ohio

May 28, 1925.

Mr. R. E. Wilson, President,
Inland Empire Oil & Gas Syndicate.

Dear Sir:

We are in receipt of your letter of May 11th calling attention to the fact that a check did not accompany our March statement rendered your

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

company. In explanation I wish to advise you that sometime ago it became necessary to charge to the various farms which we operate in the Sunburst field the investment and expense of the water lines serving these properties, which had heretofore been carried in the water line account. The Inland Empire Oil & Gas Syndicate's proportion of this investment and expense totals approximately \$4,900.00 and for that reason a check was not forwarded to you for the credit balance as shown on the March statement. We are preparing an itemized statement accounting for your company's proportion of these charges which will go forward to you in the near future.

A check in settlement of your April credit balance is being mailed today.

Yours truly,

/s/ F. A. BILLSTONE.

EBR:wy [347]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

Freeman, Thelen & Frary
Attorneys at Law
12-16 Conrad Bank Building
Great Falls, Montana

James W. Freeman
John N. Thelen
Gerald S. Frary

Shelby, Montana,
July 17, 1925.

J. P. Freeman
Ohio Oil Company,
Findlay, Ohio

Gentlemen:

We have been retained by the Potlatch Oil and Refining Company, and the Inland Empire Company, of Shelby, Mont., in connection with a certain operating agreement that your Company has with these Companies, whereby and by which your Company is drilling upon certain acreage formerly belonging to or in which our Companies have an interest.

We understand that our clients have made various objections from time to time, to your mode of rendering an account and to the charges made by your Company in connection with the operation of said leases. We are of the opinion that quite a number of your charges are unjust and unreasonable, and unwarranted under the terms and con-

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

ditions of the contract. However, your Company and our firm have always been on friendly terms and we thought that it might be to the best interests of all concerned if we could go over these contracts and your charges and see if some adjustment could not be made, satisfactory to our clients. [348]

We are very sure that your Company wants to do what is right and it might just be possible that some of the charges made, to which our Companies are objecting, have been made without special knowledge to your company and matters might be talked over and adjusted, without any feeling and in a friendly manner. We, therefore, would be pleased if you would so arrange it, that we would have a conference with your Company or your legal representatives, so as to get these matters straightened out. We trust that this can be done, otherwise we would have to take such action as we deemed necessary to protect our clients.

We might say further, that we wish especially to call your attention, at this time, to your so-called "Detailed Adjustment Statement" with reference to your Sunhio Water Plant. Our Companies have just recently received this statement, and we understand that you are holding up certain moneys due our Companies, and charging our Companies with certain expenses incurred in connection with your Sunhio Water Plant.

We wish to notify you on behalf of our Companies, and this shall be notice to you, that we

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

disclaim any interest in your Sunhio Water Plant. We have never agreed to enter into any private water arrangement with your Company, or anyone else, and our clients are not interested in your Water Plant, and do not now care to be so interested. We, of course, cannot see under what theory you can charge our Companies with this [349] expense and we will ask that you refrain from making any such deductions and that the moneys due our Companies be paid without unnecessary delay.

As above stated, we believe that all of these matters can be adjusted, if all parties concerned get together and discuss them across the table. At any rate, we believe that this should be done before the matter reaches a more serious stage, so, we certainly believe that some arrangements should be made along this line. However, if this suggestion is not acceptable to you, kindly let us know, and we shall then take the matter into court, to have it determined there.

We would appreciate very much if you would acknowledge this letter at your earliest convenience.

Yours very truly,

FREEMAN, THELEN &
FRARY,

By /s/ J. N. THELEN.

JNT.M [350]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

July 21, 1925.

Freeman, Thelen & Frary,
Attorneys at Law,
12-16 Conrad Bank Building,
Great Falls, Montana.

Gentlemen:

By reference I have your letter of July 17th addressed to The Ohio Oil Company in behalf of your clients, the Potlatch Oil & Refining Company and the Inland Empire Company, concerning the charges made in connection with the operation for oil and gas on certain properties in which your clients are interested.

We appreciate the spirit of your letter in suggesting that the matters of difference be frankly discussed. While we feel that the charges were carefully prepared and are entirely justified, representatives of the company will be glad to meet you and discuss with you fully and frankly any items your companies are complaining of. To that end, I am sending a copy of your letter to Mr. F. B. Firman, the Cashier of the company at Casper, Wyoming, who is familiar with the entire matter, and I am suggesting that he arrange a conference

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)
with you at such time and place as may be found
mutually agreeable.

Yours truly,

MERLE N. POE,
General Counsel.

(Signed in Pencil—Carbon Copy.)

MNP:IR [351]

The Ohio Oil Co.
Findlay, Ohio

Producing Department,
J. P. Sutton, Asst. Treas.

October 9, 1924.

Potlatch Oil & Refining Co.
Shelby, Montana.

Gentlemen:

We acknowledge receipt of your letter of October 6, in which you call our attention to drilling charges against the Baker Well No. 9 on our August statement.

We wish to advise that these charges were in error and same will be corrected on our September statement.

Yours truly,

/s/ J. P. SUTTON,
Assistant Treasurer.

HHW:EN [352]

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

The Ohio Oil Co.

Casper, Wyoming

January 15, 1941.

Potlatch Oil & Refining Company,
Shelby, Montana.

Gentlemen:

We have copy of your letter of January 9 concerning 1500 ft. of 2" junk pipe.

It is possible that 500 ft. of the pile of this so-called junk pipe could be used for light field purposes, and, if so, it would have a resale value of about 10c per foot. Considering this value in connection with the value of the junk pipe which could not be used for light field use, this would give a possible total value of \$60.00 for the entire 1500 ft.

If you are interested in this pipe and will take the entire batch off our hands at \$60.00, we would be willing to make the sale to you instead of trying to sell it to a junk dealer. In this case, would you please get in touch with Mr. Fredell who could handle the sale to you.

If the sale is made, we will, of course, revise the credit to the part interests under the Baker lease

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

to make it correspond to the actual price received for the pipe.

Yours very truly,

J. A. LEE,
Cashier.

JAL:cmb [353]

The Ohio Oil Co.
Findlay, Ohio

January 14, 1941.

Potlatch Oil & Refining Company,
First National Bank Building,
Shelby, Montana.

Gentlemen:

This is in answer to your letter dated January 9th requesting information as to the possibility of your purchasing 1500 feet of junk line pipe, also calling our attention to error in calculation of interest on our bill to the Inland Empire Oil & Gas Syndicate No. W-463.

With reference to the junk pipe, we are referring this question to our Casper office for consideration and you no doubt will hear from the management there within a few days.

We find the interest charge on the Inland Empire Oil & Gas Syndicate's bill to be in error as you state. Correction of 37c will be made on our next

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

billing. We thank you for calling this matter to our attention.

Yours truly,

/s/ W. J. SHEEHAN,
W. J. SHEEHAN.

WJS:M

cc J A Lee [354]

January 9, 1941.

The Ohio Oil Company,
Findlay, Ohio,
Casper, Wyoming.

Gentlemen:

Referring to Potlatch Oil & Refining Company statement W 468-40 dated November 30, 1940, and to Inland Empire Oil & Gas Syndicate statement W463-40 of same date.

We note the item of expense, viz "Credit for 1500 ft. 2" lead line pipe junked" .O1CR. We are in the market for some old pipe of this description and since the above 1500 feet of lead line is apparently of no value to the Ohio Oil Company, we should like to buy it from you. We approached your Superintendent here, Mr. Jack Fredell, in regard to the matter and he suggested that we should write to you. We will pay you 1c a foot for this junked pipe or \$15.00 for the 1500 ft.

On the Inland Empire Oil & Gas Syndicate statement, W 463-40, we note total interest charges in

(Testimony of Jean P. Gerlough.)

Plaintiffs' Exhibit O—(Continued)

the amount of \$6.29. This apparently is an error as the interest should be \$5.92, and the net credit for the month should be \$71.95 instead of \$71.58.

Very truly yours,

POTLATCH OIL & REFINING COMPANY,
INLAND EMPIRE OIL & GAS SYNDI-
CATE

Mgr.

(Carbon Copy.) [355]

December 3, 1938.

The Ohio Oil Company,
Casper, Wyoming.

Gentlemen:

Referring to your statement W-422-38 covering operations on the Baker & I. Sindon leases for October, 1938, and in particular to those items entitled "Closing Our Warehouse Stock to Farms In District" and "Closing out Sunburst Stock Account to Farms in District."

It is evident from the statement that you have charged each farm with its proportionate share of the materials and equipment in the warehouse and Sunburst Stock accounts according to the number of wells on each farm. However, we fail to understand the reason for making these charges. Are we to understand that each farm is to be charged with a lot of equipment and supplies before they

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

are used and whether said equipment and supplies can be used on the respective farms or not.

We failed to get much enlightenment on this subject at your Shelby Office, and would appreciate an explanation of the above-mentioned charges from your office.

Very truly yours,

POTLATCH OIL & REFINING
COMPANY,

Mgr.

(Carbon Copy.) [356]

The Ohio Oil Co.

Findlay, Ohio

C. W. Roberts,

Assistant Treasurer.

December 21, 1938.

File: 683-38

Potlatch Oil & Refining Company,

First National Bank Building,

Shelby, Montana.

Attention of Mr. Jean P. Gerlough, Manager.

Gentlemen:

This is in answer to your letter of December 3 with reference to our joint interest bill W-422, particularly items entitled "Closing Our Warehouse Stock to Farms in District" and "Closing out Sunburst Stock Account to Farms in District."

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

A survey of our warehouses disclosed that too much clerical work was being expended in accounting for the operations, and, as of October 1, we discontinued warehouse accounting. The amount of \$1,892.65 and the amount of \$899.72 appearing on our bill, with detail schedules attached, have been charged as expense items to the various leases formerly served by the warehouse. There will be no subsequent transfers issued for this material when used. At the time it is completely absorbed and additional purchases become necessary, such purchases will be charged direct to expense from the invoice.

Our purpose in making these changes in our accounting methods is to eliminate unnecessary expense and, in addition, to relieve us of a lot of trouble with the Federal Bureau of Income Tax. We feel that over a period of time a substantial saving in operation of the properties will [357] result.

If you have any further questions, please write us.

Yours truly,

/s/ C. W. ROBERTS.

CWR:HCM

CC: Mr. J. A. Lee, Casper. [358]

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

January 28, 1938.

The Ohio Oil Company,
Findlay, Ohio.

Gentlemen:

We wish to call your attention to the credit item for 3-inch tubing on our statements dated November 30, 1937, Bill Nos. W 488-37 and W 482-37 respectively.

This item credits the I. Baker lease back with 1680 feet of 3-inch common tubing in the amount of \$201.60 or at the rate of only 12c a foot. The going price for second hand 3-inch tubing and line pipe in this field runs between 25c and 30c per foot. Some pipe in extra good condition commands prices even higher than that, but we do not know of any second hand 3-inch pipe in the field that can be bought for less than 25c a foot. We recently purchased some ourselves that was not as good as the tubing removed from the Baker lease and we had to pay 29c a foot for it.

It is our desire, therefore, that an adjustment be made of the above credit item. We offered to buy the above string of tubing from The Ohio Oil Company here and the price we were asked was 25c a foot for it. For this reason, we are of the opinion that the Baker lease should be credited with an additional 13c a foot for the above-mentioned string of tubing.

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

Trusting that such an adjustment will meet with your approval, we remain,

Very truly yours,

POTLATCH OIL & REFINING COMPANY,
INLAND EMPIRE OIL & GAS SYNDI-
CATE

By.....,

Mgr.

(Carbon Copy.) [359]

The Ohio Oil Co.

Casper, Wyoming

February 17, 1938.

Potlatch Oil and Refining Company,
Shelby, Montana.

Gentlemen:

Your letter of January 28 addressed to The Ohio Oil Company, Findlay, Ohio, has been referred to this office for reply, this letter having to do with credit item for 3" tubing allowed you on your November bills No. W-488-37 and No. W-482-37, respectively.

This matter has been taken up with our Mr. Yealy and we now find that the pricing on these transfers of 12c in this office was in error and the correct price should have been 25c, and we are advising our General Office to this effect, and you

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

may look for additional credit in the amount of 13c per foot on our next part-interest bill to you.

Very truly yours,

/s/ J. A. LEE.

NLB:DC [360]

The Ohio Oil Co.

Casper, Wyoming

June 1, 1936.

Mr. Gene P. Gerlough, Treasurer,
Potlatch Oil & Refining Company,
First National Bank Building,
Shelby, Montana.

Dear Mr. Gerlough:

Our general office in Findlay has forwarded your valued inquiry of May 20th to us for reply. Accordingly I have today addressed a letter to our Mr. McCracken at Shelby and you may expect a call from him shortly. I am sure that Mr. McCracken will be able to satisfactorily answer any questions which you may have.

With personal regards, I am

Sincerely yours,

/s/ L. M. KIPLINGER.

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

Potlatch Oil & Refining Company

A Corporation

Offices: First National Bank Building

Shelby, Montana

Mr. L. M. Kiplinger,
The Ohio Oil Company,
Casper, Wyoming.

Dear Mr. Kiplinger:

I have your letter dated June 1, 1936.

In reply, I might say that before I wrote the general office of the Ohio Oil Company at Findlay, I had called on Mr. Yealey and Mr. McCracken here and discussed the item Sunburst District Expense which was appearing on our statements and they seemed unable to explain why this change had been made in the auto and trucking charges.

After receiving your letter, I again called upon Mr. Yealey and Mr. McCracken at the Shelby office of the Ohio Oil Company and they seemed unable to shed any further light upon the matter. It would appear from their conversation that they have absolutely nothing to do with the way these operating charges are set forth or distributed upon the monthly financial statements which we receive. Consequently, I have not yet had any satisfactory answer to the question as to why the Ohio Oil Company ceased charging actual auto and trucking expense

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

to the Baker lease and in place of this item on the statement introduced the item Sunburst District Expense which included all the auto, trucking and camp expense of the field and then pro rated same according to the number of producing wells. The result of this new distribution has been that [362] the Baker lease is now paying about three times as much for auto and trucking as it has any time during the past five years when operations have been just about on a par with present operations on the lease.

I wish to call attention to the fact that we are not liable for expense of operation other than that actually incurred on the Baker lease. Our contract states that specifically, and frankly, we cannot see why the Baker lease should be made to bear more than its own share of any operating expense. Under the plan of distribution of auto, trucking and camp expense which you call Sunburst District Expense there is little question but that the poorer leases of the Ohio Oil Co.—those having little or no production—are being carried along by the leases having a large number of wells such as the Baker. We object to paying more than our actual share of this expense since we have no interest whatever in lands

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

or leases of the Ohio Oil Company other than the ones named in our contract.

Very truly yours,

POTLATCH OIL & REFINING
Co.

INLAND EMPIRE OIL & GAS
SYNDICATE,

/s/ JEAN P. GERLOUGH,
Treas. [363]

The Ohio Oil Co.
Casper, Wyoming

July 1, 1936.

Mr. Gene P. Gerlough, Treasurer,
Potlatch Oil & Refining Company,
First National Bank Building,
Shelby, Montana,

Dear Mr. Gerlough:

Since the receipt of your letter of June 9th I have made further investigation of the matter of charges for services of our pick-up trucks and have just lately conferred with other operating companies in order to learn what system is used by other companies in making such charges.

I find that it is the experience of all that the well basis is the only practical method by which such general charges can be properly allocated to

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

the various leases served. It is impossible to determine each day just how much work may be allocated to each lease. It would be uneconomical, of course, to assign a truck to each lease. The pick-up trucks carry men to the work often starting from a central point and delivering a man or two to various leases. Materials and supplies are also delivered in the same manner. It would be foolish to try to ask the driver of the pick-up to make proper segregation of services rendered various leases. Consequently, we can only prorate such charges on the well basis.

I have given thought to other methods which might be used such as proration on the basis of the number of barrels of oil produced. This, as you can readily see, would work a decided hardship on the Baker lease and would not be fair. [364]

In your particular case I feel that it is not a case of your being overcharged at this time but rather that through circumstances you were undercharged over a considerable period of time. During the time that the field was being prorated, the Condition of Operations reports coming from the Shelby office indicated that the proportion of wells producing on the Baker lease compared to the total wells in the field (operated by Ohio) was as follows:

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

Wells		
Year	Producing on	Total Ohio
1935 and 1936	Baker Lease	Wells Producing
January, 1935	3	34
February	3	34
March	3	35
April	3	35
May	3	35
June	6	48
July	1	32
August	1	32
September	4	42
October	4	42
November	14	53
December	14	54
January, 1936	14	54
February	14	54
March	14	54
April	14	54
May	14	54

From the foregoing you can readily see that the percentage during most of 1935 charged against the Baker lease was far out of line being much less than the services rendered to the lease. We realize that the circumstances were peculiar because on the Baker lease, the large well was able to produce the share of oil allocated to the lease. However, the actual expense of operating the lease was not reduced in as great a [365] proportion as the charges were reduced.

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

I am sorry that Mr. McCracken failed to make this matter clear to you and stated that they had absolutely nothing to do with the way these operating charges are made because the basis of distributing these charges is information furnished entirely by the Shelby office.

I hope that I have made the matter clear. There has been no change in our method of distributing the charges and as I have pointed out, the method which we follow is the usual and customary method throughout the industry. We believe that it is fair and that in your particular case the circumstances have worked to your advantage and our disadvantage throughout the year 1935.

I do not know what else I can add to this letter but I will appreciate any further questions which you may have in the matter.

Yours very truly,

/s/ L. M. KIPLINGER.

LMK/ljs

cc-V. B. McCracken [366]

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

Potlatch Oil & Refining Company

A Corporation

Offices: First National Bank Building

Shelby, Montana

May 20, 1936.

The Ohio Oil Company,

Findlay, Ohio.

Gentlemen:

We are writing you on behalf of both the Potlatch Oil & Refining Company and the Inland Empire Oil & Gas Syndicate in regard to the item Sunburst District Expense which has been appearing upon our monthly statements of Baker lease operations during the past four months.

It appears that instead of charging the actual field auto and trucking expense incurred on the Baker lease or in connection with its operation, you are now lumping all of the auto and trucking expense the Ohio Oil Company has in this district and are pro-rating all of this expense against the producing leases according to the number of producing wells. Under this arrangement, it is obvious that the lease having a large number of wells such as the Baker lease, is carrying much more than its rightful share of this expense, while other lands and leases having little or no production (but requiring supervision and hence auto expense just the same) are riding practically free of such charges.

We do not believe this is in accordance with

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

either the letter or the spirit of our contracts with the Ohio Oil Company. [367] If this items of expense is continued thru the year as it has started, the auto and trucking expense for the year will be in the neighborhood of \$1000.00 or two and one-half times as much as this item has averaged during the past five years. This may be a convenient method of handling the auto and trucking charges for you, but it certainly is not fair to us. We are not interested in your other lands and leases and would prefer to pay only our just share of actual expenses on the Baker lease.

Trusting that this matter may be satisfactorily adjusted, we remain,

Very truly yours,

POTLATCH OIL & REFINING COMPANY and
INLAND EMPIRE & OIL & GAS SYNDI-
CATE.

By /s/ JEAN P. GERLOUGH,
Treasurer. [368]

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

January 7, 1936.

The Ohio Oil Company,
Findlay, Ohio.

Gentlemen:

Referring to statement W-470-33 covering operations on the B. Sindon lease for the month of June, 1933.

In this statement thru an error in addition, and overcharge of \$100.00 was made against us. On January 30, 1934, we wrote to you calling attention to the error, requesting that same be corrected in the next statement rendered. Apparently no attention was paid to this request. Will you please make correction of the above \$100 error in the account so that our books will check with your statement.

We enclose a copy of the letter written you January 30, 1934.

Very truly yours,

POTLATCH OIL & REFINING
COMPANY.

Treas.

(Carbon copy.) [369]

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

The Ohio Oil Co.

Findlay, Ohio

January 11, 1937.

Potlatch Oil & Refining Company,
First National Bank Building,
Shelby, Montana.

Gentlemen:

We are writing with reference to your letter dated January 7, regarding credit of \$100.00 which you state was not passed to your account as requested in your letter dated January 30, 1934.

Our records indicate this credit was entered on our records in January, 1934, and should be reflected on your copy of our Bill No. W-27-34 dated January 31, 1934. If after checking this statement you find this entry is not shown, please advise.

Yours truly,

/s/ W. J. SHEEHAN,

W. J. SHEEHAN.

WJS:GJ [370]

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

Potlatch Oil & Refining Company
A Corporation

Offices: First National Bank Building
Shelby, Montana

December 30, 1935.

The Ohio Oil Company,
Findlay, Ohio.

Gentlemen:

We wish to call your attention to the charges made on our October 31, 1935, statement, Bill No. W-583-35 for casing and casing equipment used on the I. Sindon well #2, and to the credits allowed for this casing and equipment on the November statement, Bill No. W-641-35 after the well had been abandoned and the casing pulled.

The charge made for the 1778 3/12 feet of 65/8" 20# lapweld casing was \$1176.86 or approximately 67c per foot. The credit given for this same casing when pulled a few days after it was run appears to be only \$501.88 or approximately 28c a foot. We believe a fair credit for this pipe would be 62 1/2c a foot and in no event less than 60c a foot. There is a ready sale for such used pipe in the field at from 65 to 70c a foot and the pipe recovered was in first class shape.

A charge was made for the 999 9/12 feet of 8 1/4" 28# lapweld casing of \$1679.58 or \$1.68 per foot. Credit given on the November statement was for only \$349.91 or at the rate of only 35c a foot. We

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

do not believe depreciation on this pipe should exceed 20% and that we should be credited back at the rate of approximately \$1.35 a foot for this [371] casing.

There does not seem to be any credit made for the 163 $\frac{3}{12}$ feet of 10-inch 32# casing charged to this well. Neither is any credit made for the $6\frac{5}{8}$ " and $8\frac{1}{4}$ " casing shoes for which a charge of \$29.71 was made. In checking the credit memoranda sent in to Findlay by the Shelby office of the Ohio Oil Company, it seems that these casing shoes were not included thru some oversight.

The total credits for casing, clamps, etc., on the November statement amount to only \$883.14 whereas total charges on the October statement were \$2992.61, the credits amounting to only $29\frac{1}{2}\%$ of the charges. We believe you will agree that some mistake has been made in figuring this out, and we trust that a fair and equitable adjustment will be made as soon as the above figures are brought to your attention.

Please advise us at your earliest convenience.

Very truly yours,

POTLATCH OIL & REFINING
COMPANY.

/s/ J. L. GERLOUGH,
Mgr.

(Photostatic copy.) [372]

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

Findlay, Ohio

January 6, 1936

File G-13

Potlatch Oil & Refining Company,
First National Bank Building,
Shelby, Montana.

Attention: Mr. J. L. Gerlough, Mgr.

Gentlemen:

We acknowledge receipt of your letter of December 30 questioning apparent discrepancies on our bills No. W583-35 and W641-35 covering joint operations for the months of October and December, 1935.

We have forwarded your communication to our Casper office for consideration and reply.

Yours truly,

.....

CWR:WCM

c/c to Mr. L. M. Kiplinger

(Photostatic Copy.) [373]

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

Return to D. N. Morrison

(Copy.)

ZJS

ROBERTS S

This is taken from L. M. Kiplinger 1936 file, Bx.
41-Pk 41

Casper, Wyoming
January 24, 1936

Potlatch Oil & Refining Company,
1st National Bank Bldg.,
Shelby, Montana.

Attention: Mr. J. L. Gerlough, Manager.

Gentlemen:

Your letter of December 30th addressed to our company at Findlay, Ohio, calling attention to charges made on our October 31, 1935, statement, Bill No. W583-35, has been referred to this office for reply as per letter dated from our General Office to you dated January 6, 1936, file G-13.

I will endeavor to give you explanation of the questions as raised by you in the same sequence as contained in your letter of December 30th.

I find on investigation that the charge for the 1778'3" of 65/8" 20# lapweld casing was charged to your company at the rate of .66181 per foot, having been purchased from a supply company in Oilmont, Montana. In some manner or other when this pipe was credited to the I. Sindon Well No. 2 there was

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

an appraised figure of 24c per foot used, but on contacting Mr. Yealy, who is in charge at Shelby, he advises that a fair charge should be at the rate of 60c per foot. Accordingly, in January business credit is being made to the I. Sindon Well No. 2 for the difference between the allowed price of 24c per foot and what should have been allowed at 60c per foot, as covered by our transfer #42148, which will mean an additional credit to this well of \$640.17. [374]

Regarding the charge made for the 999' 9" of 8 $\frac{1}{4}$ " 28# lapweld casing at \$1.68 per foot: This was transferred out of our warehouse as new pipe and we were in error in only crediting you on an appraised basis of 35c per foot. Mr. Yealy has agreed that a fair rate of depreciation for the use of the pipe at this well would be 20% as contained in your letter of December 30th. Therefore, reducing the pipe at \$1.66 per foot by 20% we arrive at the rate of \$1.344 per foot, which you should have received credit for instead of 35c per foot. Accordingly, we have issued transfer #42149 in January business, which will give you additional credit on this string of pipe of \$993.75.

Regarding the 163' 3" of 10" 32# casing charged to this well: This was charged to your account from our Warehouse at a price of 46c per foot, or a total of \$75.10, and you were allowed a like credit for this pipe on the November statement at 46c per foot

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

or \$75.10, but you have evidently interpreted this \$75.10 as being a portion of the credit allowed you in November for the 1778' 3" of 6 $\frac{5}{8}$ " casing, as in your letter you state credit for 6 $\frac{5}{8}$ " was allowed in the total amount of \$501.88. If the statement so showed same, it is in error as the credit allowed for the 1778' 3" of 6 $\frac{5}{8}$ " at 24c per foot totaled \$426.78, and credit for the [375] 163' 5" of 10" casing totaled \$75.10, and the two amounts equal \$501.88 as contained in your letter of December 30th. The above explanation should take care of the discrepancies on credit allowed for the pipe.

Regarding the credit for 6 $\frac{5}{8}$ " and 8 $\frac{1}{4}$ " casing shoes I am advised by our Shelby office that these casing shoes were transferred away and credits should appear on our December, 1935, statement.

I believe with the explanations as given above and with the additional credits which we mentioned will be run through in January business this should take care of this matter to your satisfaction. We are very sorry that these corrections are necessary as it was not our intention to transfer this material on this basis but as stated above the transfers were priced on an appraised figure, it being assumed that it was old pipe which had been in the hole and just recently pulled out. If by chance the explanations as contained in this letter are not complete, we would be glad to have you address us

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)
at Casper, and we will endeavor to give you additional explanation.

Very truly yours,

/s/ L. M. KIPLINGER.

NLB:GF

cc—C. W. Roberts

H. L. Bottoms

V. B. McCracken

W. W. Haines

N. L. Battenschlag [376]

Potlatch Oil & Refining Company
A Corporation
Offices: First National Bank Building
Shelby, Montana

January 30, 1934

The Ohio Oil Company,
Findlay, Ohio.

Gentlemen:

In auditing our accounts for 1934, we find that on your statement of the B. Sindon Lease account for June 30, 1933, Bill No. W-470-33 you have made an error of \$100.00 in addition. In adding \$114.29 to \$15,026.24 you have \$15,240.53 instead of \$15,140.53. This error has been carried forward

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

thru the year and the account is still off \$100.00.

Please correct on your next statement.

Very truly yours,

POTLATCH OIL &
REFINING COMPANY,

/s/ JEAN P. GERLOUGH,
Treas.

(Pencil notation.)

Interest credit of \$100.00 will be given on Jan.,
1934, Bill.

D.N.M. [377]

Potlatch Oil & Refining Company

A Corporation

Offices: First National Bank Building

Shelby, Montana

July 19, 1933.

The Ohio Oil Company,

Findlay, Ohio.

Gentlemen:

We wish to call attention to your statement of
May 31, 1933, Bill No. W-391-33.

This statement shows gas sold from the I. Sindon
lease during May in the amount of \$26.82 of which
our 45% amounted to \$12.07. This was overlooked
in summarizing the account where the item Income
showed \$14.45 instead of \$26.52 as it should have

(Testimony of Jean P. Gerlough.)

Plaintiff's Exhibit O—(Continued)

been, and our net credit should be \$641.60 instead of the \$629.53 which you paid.

Very truly yours,

POTLATCH OIL &
REFINING COMPANY,

/s/ JEAN P. GERLOUGH,
Treas.

(Pencil notation.)

This is corrected on our June, 1933, bill.

Wonder.

Write in reply to this letter Monday [378]
7/24/33.

(Carbon copy.)

Findlay, Ohio,
July 24, 1933.

Refer to File WG-571
Potlatch Oil & Refining Company,
First National Bank Building,
Shelby, Montana.

Gentlemen:

We are replying to your letter of July 19 regarding our Bill W-391-33 under date of May 31, 1933.

We detected the omission on our summary of your proportion of gas sold from I. Sindon lease and are pleased to advise that same will be included in our June billing.

Yours truly,

CWR:RP [379]

No. 13010

United States
Court of Appeals
for the Ninth Circuit.

POTLATCH OIL & REFINING COMPANY, a
Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN and ROY E.
LARSON, as Trustees of That Certain Trust
Known as Inland Empire Oil and Gas Syndi-
cate, a Common Law Trust,

Appellants,

vs.

THE OHIO OIL COMPANY, a Corporation,
Appellee.

Transcript of Record
In Two Volumes

Volume II
Pages 369 to 635)

Appeal from the United States District Court,
for the District of Montana.



No. 13010

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POTLATCH OIL & REFINING COMPANY, a
Corporation, and JEAN P. GERLOUGH,
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Appellee.

Transcript of Record
In Two Volumes

Volume II
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Appeal from the United States District Court,
for the District of Montana.



JEAN P. GERLOUGH

Redirect Examination

(Continued)

By Mr. McCabe:

Q. Mr. Gerlough, in the year of 1945 did the Potlatch Oil and Refining Company and Inland Empire Oil and Gas Company employ an attorney to represent them? A. Yes, they did.

Q. Who did they employ?

A. Mr. E. J. McCabe of Great Falls.

Q. And who represented the companies in informing Mr. McCabe he was attorney for these two companies? A. I did.

Mr. Everett: I think that is wholly irrelevant and immaterial. You filed the pleadings, didn't you, in the action? We have no objection.

Q. After I was employed did I direct your attention to certain letters and communications between myself as attorney for the two companies you mentioned and The Ohio Oil Company?

A. Yes, you did.

Mr. Everett: I would like to ask first what is the purpose of this testimony.

Mr. McCabe: The purpose of the testimony is to show in the course of this correspondence as attorney for the company express demand was made for an accounting being made upon the company and that no accounting was made. [380]

Mr. Everett: I didn't think any part of accounting was to be tried or any issue with respect to it this morning.

(Testimony of Jean P. Gerlough.)

Mr. McCabe: That is correct. However, your Honor, we have alleged in the complaint a demand for accounting was made and no accounting was in fact made pursuant to that demand.

The Court: When was it; 23 years after?

Mr. McCabe: What is that?

The Court: Twenty-three years after the contract was entered into.

Mr. McCabe: Oh, yes, in 1945 and 1946, and 1946 is the year that I made the demand as attorney for the plaintiffs.

Mr. Everett: I don't see the relevancy of it. I can state for the record if that is sufficient for Mr. McCabe, that he came down to Casper, Wyoming, on July 27, 1946, or shortly thereafter, at which time Mr. Healy and I met with him, and he said, we have a claim, and we said, well, if you have one, what is your contention? He told us his contention and we said, if that is correct, then we think you better go to court with it because we just cannot agree with it. If that constitutes a demand, if that is sufficient, as far as I say, I will say it was a demand, Mr. McCabe. I don't see any use in cluttering up the records. Here is what Mr. McCabe is leading up to, this bunch of papers. [381]

Mr. McCabe: You said you would stipulate as to certain phases. Will you stipulate that these letters that I refer to I wrote you demanding that The Ohio Oil Company render an account and containing such reference to the fact that objections had been made to the account by the Potlatch Oil

(Testimony of Jean P. Gerlough.)

and Refining Company and the Inland Empire Oil and Gas Syndicate?

Mr. Everett: Yes, that is actually what happened and further than that I will ask you to add to the stipulation for the record there is one other thing which we told you at that time and informed you at that time that, our construction of the contract and we were just clearly at odds and you better go to court with it.

Mr. McCabe: You recall at that time you said if these errors were in fact that The Ohio Oil Company would not make objections on the grounds of laches and limitations of actions in the presence of Mr. Healy. There was a question whether or not these charges were correct and proper but that is the statement you made at that time.

Mr. Everett: Well, I have a memorandum that I made at that time of our conference, and I will state that as my understanding, and if that isn't sufficient to cover the matter, we will see if the court wants to let you go ahead. I think it is wholly incompetent, irrelevant and immaterial to any issue in the trial. [382]

The Court: I don't know that it does any more than shows you went down there and had a talk with the officers and attorney for the company and made a demand on them for settlement and they declined and said you better sue. Now, what further is necessary in connection with it?

Mr. Everett: That is a satisfactory statement of the situation.

Mr. McCabe: That is satisfactory to me, your Honor. There is no use cluttering it up with what he said and what I said. Did you make that statement?

Mr. Everett: You said what the court said was satisfactory with you and that is satisfactory with me.

Mr. McCabe: All right.

The Court: Now take up the next matter.

Mr. McCabe: Mr. Everett, is there any question that Mr. H. H. Healy was Division Manager of The Ohio Oil Company during the year 1945, and years 1946, up to the present time?

Mr. Everett: Yes, sir, as Division Manager, and formerly Division Attorney and has been employed by the Company as Division Attorney and as Division Manager; in the first capacity until I became associated in the Company in 1941 as its Division Attorney, at which time Mr. Healy was Division Manager and has continued to act as such and in that capacity has since. [383]

Mr. McCabe: That is sufficient. That is all.

Mr. McCabe: The next witness is a very short witness. Mr. L. J. Yealy.

L. J. YEALY

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. McCabe:

Q. Mr. Yealy, it has been stipulated——

The Court: What is the witness' name?

(Testimony of L. J. Yealy.)

A. L. J. Yealy.

Q. You were employed, were you, by The Ohio Oil Company at various times? A. Yes, sir.

Q. And during the years of 1923 on were you employed by that company? A. Yes, sir.

Q. And what years were you so employed, between what years?

A. By The Ohio Oil Company?

Q. Yes. A. Between 1893 and 1938.

Q. How long were you District Superintendent for The Ohio Oil Company?

A. I can't answer that exactly.

Q. Just approximately.

Mr. Everett: Tell him what years you mean, 23 years [384] or more or something like that.

Q. What is that? A. 23 or 24 years.

Q. During the years 1923 to—from 1923 on did you hold that position with The Ohio Oil Company?

A. Until 1938, yes.

Q. Now, during those years was there any other resident agent or representative of The Ohio Oil Company residing in Toole County, Montana?

A. Not ahead of me.

Q. Ahead of you? A. Above me.

Q. Above? A. Yes, sir.

Mr. McCabe: That is all.

Cross-Examination

By Mr. Everett:

Q. Mr. Yealy, when did you first go to the Kevin Sunburst Field in Toole County, Montana? When did you first go to Shelby?

(Testimony of L. J. Yealy.)

A. From Wyoming I went to Shelby in 1922, September 2nd.

Q. September 2, 1922? A. Yes.

Q. And you were in charge of the field operations? A. Yes, sir. [385]

Q. And in charge of the local office?

A. Yes, sir.

Q. Was any part of the accounting with reference to those operations done in that office?

A. The accounting was done in the head offices at Findlay, and then Findlay and Casper.

Q. Did you know Mr. T. P. Jones?

A. I did.

Q. Do you know Mr. Jean Gerlough?

A. I do.

Q. During the time that you were up there did either of those gentlemen make any complaint to you——

Mr. McCabe: To which we object on the ground it is improper cross-examination. The witness solely testified to his connection with the company. Now, that is properly a part of the case in chief.

The Court: I think I should sustain the objection.

Mr. Everett: Well, we will call you later. Unless you want to while the witness is on the stand let me present him as my witness on direct examination.

The Court: If that is all you are going to call the witness for, that one point.

(Testimony of L. J. Yealy.)

Mr. McCabe: I rest anyway, if counsel is through his cross-examination, we rest our case.

The Court: You rest now?

Mr. McCabe: Yes, your Honor, plaintiff [386] rests.

Mr. Everett: We will call Mr. Yealy as our first witness.

The Court: For the defense.

Mr. Everett: May it be considered that the questions we have already asked him on cross-examination shall be considered as part of the direct examination?

The Court: It may be.

Direct Examination

By Mr. Everett:

Q. Mr. Yealy, during the time that you were in Shelby at any time during the time the Troy Sweet Grass Oil Syndicate had an interest in the Baker and in the I. Sindon leases, did they ever object to any charges made in connection with the operations on those leases?

Mr. McCabe: To which we object on the grounds it calls for a conclusion of the witness and that the witness be confined to state what was said by them in any conversations or communications and what he said in return.

The Court: I will let him testify as to whether they made any complaints about the contract about the execution——

Mr. McCabe: About the charges.

(Testimony of L. J. Yealy.)

Mr. Everett: About the charges under the [387] contract.

Mr. McCabe: That is all.

The Court: Then I will permit him to answer.

Q. (By Mr. Everett): The Troy Sweet Grass?

A. Answer the question?

Q. Yes.

A. There was no direct charges as I can remember with the exception on Mr. Gerlough's part. Mr. Gerlough used to come to our office quite often and complain and ask about some of the charges that was made; some of the questions I could answer and some I couldn't. The ones I couldn't answer I left him to take up with our head offices either in Findlay or Casper. If I got any letters as to this thing, those were referred to our legal departments in Findlay or Casper and they I supposed answered his questions or the letters.

Q. Well, did Mr. T. P. Jones ever make any objections to any charges that were made; did he ever make any objections to you about any charges that were made?

A. He never came to my office or never contacted me on the purpose of the subject. I met Mr. Jones one time when I was coming from Spokane across to Shelby and we rode in the same car and that is the time Mr. Jones had charge of the Potlatch and these other properties and at that time he questioned some of our charges in regard to a water line that we had, and he said at that time that he was contemplating [388] bringing a suit against

(Testimony of L. J. Yealy.)

the Ohio Oil Company for an accounting. And I told him how we handled the business from the field and this business all went through Casper and Findlay. And after I had talked to him he didn't say "yes" and he didn't say "no"; he seemed to be satisfied, and he never started any suit, so I took it for granted Mr. Jones was satisfied with the explanation I gave to him about the charges.

Q. Do you remember about when that was when you were on the train, what year?

A. It was sometime between 1922 and 1925, or sometime in there.

Q. Was it shortly after you went into the—was it the time Troy Sweet Grass had the properties or Potlatch and Inland had the properties?

A. Well, I don't remember just when they made the charges, although I had these photostatic copies and the like in my office that I could have told at the time but I can't remember just when they made those charges, when they were consolidated or whatever they done.

Q. Did he ever file or make—did Mr. Jones ever file or make any written complaints to your office?

A. Not to my memory.

Q. And he never came to your office in Shelby?

A. He never came to the office for that business. He [389] has been to the office but it was personal business he was there on on his own.

Q. You testified Mr. Gerlough did come to the office from time to time?

(Testimony of L. J. Yealy.)

A. Mr. Gerlough use to come to our office when he had some question to ask on some charges.

Q. When is your best recollection of the first time he ever came to the office?

A. I couldn't tell. Mr. Gerlough lived there in town and he used to come there sometimes maybe on business and sometimes maybe to visit or something but I couldn't tell the first time Mr. Gerlough ever came to our office.

Mr. Everett: You may take the witness.

Cross-Examination

By Mr. McCabe:

Q. Mr. Yealy, since the time you discussed this matter with Mr. Jones have you ever talked this matter over with any persons at all?

A. No, sir, not with the Troy Sweet Grass people.

Q. Have you talked it over with anyone?

Mr. Everett: Of course, he has talked to me and Mr. Donovan; is that what you are getting at. We have talked to him the same as you have as a [390] witness.

Q. (By Mr. McCabe): Let him answer my question.

A. Yes, I have talked to Mr. Donovan.

Q. And how long ago was that?

A. That I talked to Mr. Donovan?

Q. Yes. A. Oh, two or three weeks ago.

Q. Now up to the time you talked to Mr. Donovan two or three weeks ago you never have discussed the matter of these claims of the Potlatch

(Testimony of L. J. Yealy.)

Oil and Refining Company and the Inland Empire Oil and Gas Syndicate which they claim to have against the Ohio Oil Company? A. No, sir.

Mr. McCabe: That is all.

Mr. Everett: That is all, Mr. Yealy.

The Court: Mr. Everett, if you have a number of witnesses, we can run until 12:30 and then come back at 2:00, and if that would facilitate your examination of witnesses and introduction of testimony. You figure on finishing today?

Mr. Everett: I appreciate that. We will make an effort to finish by 12:30, your Honor.

The Court: Oh, well, then go ahead. I will stay here until 1:00 if you like to finish now if you can.

Mr. Everett: Defendant offers in evidence Exhibits P, Q, R, and S, and so marked, being certified copies of the [391] death certificates of Mr. F. E. Hurley, Mr. Frank B. Firmin, Mr. John McFayden, and Mr. A. M. Seller.

Mr. McCabe: To which we object on the grounds it is repetition; the deaths of all of these persons has been admitted and stipulated and filed in the record in this case and it is merely——

The Court: Well, I don't know, the deaths mentioned here and the testimony taken here and I don't know that it has been stipulated. Did you enter into a stipulation these persons died on a certain date?

Mr. Everett: One or two are covered but I wanted to be sure. This is the burden I have.

The Court: They may be received in evidence and no question can be raised on them.

Whereupon said Defendant's Exhibits P, Q, R, and S, offered and received in evidence, are a part of this record.

Mr. Everett: Our next order of procedure we have two depositions, those of A. M. Gee and Mr. Luke, and Mr. Donovan will take care of those depositions, and we will try to handle it in a fashion of considerably shortening it by giving a summary of it and let Mr. McCabe——

Mr. McCabe: I will be willing to extend the same gracious courtesy extended to me by counsel when we were presenting our testimony, and consent that the depositions of [392] A. M. Gee and Kenneth Luke be admitted in evidence subject to the available objections except the objections to the form of the question.

Mr. Donovan: May we have the deposition of K. G. Luke opened, your Honor?

The Court: Yes.

Mr. Donovan: The defendant offers in evidence the deposition of Mr. K. G. Luke or Kenneth G. Luke. I don't suppose the court wants it read?

The Court: No, it isn't necessary.

Mr. Donovan: Does the court desire a statement what its substance is?

The Court: Yes, you might state the substance.

Mr. McCabe: It may be stipulated the deposition may be entered in accordance with my statement.

The Court: What is it?

Mr. McCabe: I have said I will make no objections so now I stipulated the deposition may be entered subject to any objections available to the respective parties except the form of the question.

Mr. Donovan: The deposition was taken in Spokane, Mr. McCabe being present and examining the witness. Mr. Luke was one of the organizers of Troy Sweet Grass Oil Syndicate. He was secretary of the Troy Sweet Grass Oil Syndicate, I believe he indicates until the fall of 1923 and he [393] was active in its affairs and gathered for Troy Sweet Grass all the oil and gas leases in the Kevin Sunburst field, including those it had and including all those in the contract dated June 15, 1922, between Troy Sweet Grass Oil and Gas Syndicate and the Ohio Oil Company. He testified in that connection the statements rendered to Troy Sweet Grass up until its interest in these leases and this contract was assigned in 1923 have been offered in evidence, these statements. In that connection the court will observe that certain charges that are now disputed by the plaintiffs appear in those statements.

Mr. Luke testified that during the period he was connected with Troy Sweet Grass Oil Company or Oil Syndicate there were no objections made by Troy Sweet Grass Oil Syndicate to any of these charges, that the operations were satisfactory and the accounting was satisfactory, at least as far as he knows, and he was secretary up until I believe about October, 1923. I think that is sufficient to

say. We are offering that partly on the construction of the contract by the parties to the contract.

The Court: Do you have another deposition?

Mr. Donovan: We have another deposition. We offer in evidence the deposition of Mr. A. M. Gee, which was taken on written interrogatories and cross interrogatories. If I may do so, I will briefly state that. [394]

Mr. McCabe: I understand the same ruling of the court it may be admitted subject to the same objections of the respective parties except as to the form of the question.

The Court: All right.

Mr. Donovan: That is satisfactory. The deposition of Mr. Gee was taken at Findlay, Ohio, on written interrogatories. He is now chief counsel for the Ohio Oil Company and living at Findlay. In 1922 he was division counsel for the Ohio Oil Company and his office was at Casper. On June 15th, 1922, or the day before, he and Mr. Hurley came to Shelby because of new interests in the Kevin Sunburst field. The Sunburst Oil and Gas Company discovery well had just come in I think on June 5th, 1922, and was deemed to be a commercial producer. He and Mr. Hurley met with A. M. Sellery, who was the lease man for the Ohio, and they were told by Mr. Sellery that he had contacted Mr. Jones and made sort of a tentative agreement, verbal tentative agreement, with Mr. Jones, and told him the substance of it. On the morning of June 15th, 1922, Mr. Hurley and Mr. Gee went over to the Troy Sweet Grass office and met Mr.

Jones and went over the matter with him along the lines which Mr. Sellery had said had been agreed to or tentatively agreed to and they reached an agreement with Mr. T. P. Jones on all terms that were to go into the operating agreement. It was to be operated upon a basis of 55% to the Ohio and 45% interest in the leases to Troy Sweet Grass with the Ohio [395] furnishing all the charges and depending upon the production or salvage for reimbursement. Mr. Gee, when that was agreed to in the presence of Mr. Hurley, now deceased, and in the presence of Mr. Sellery, now deceased; Mr. Gee went back to his office and drafted the contract. And then returned, I believe Sellery went with him, and then returned to the Troy Sweet Grass office, and went over the matter with Mr. Jones, and the contract was in all respects found satisfactory, and it was executed on behalf of Troy Sweet Grass by Mr. T. P. Jones, President, and Mr. K. G. Luke, as Secretary, and executed on behalf of the Ohio by Mr. Hurley, Vice President.

There was no objections raised to the language by Mr. Jones. There was no rewriting of the contract, and there was no discussion along the lines that only charges within the four corners of the lease could be made. The language of the contract is that all costs of development and operation shall be paid by the Ohio Oil Company and 45% thereof charged to Troy Sweet Grass Oil Syndicate, and the contract expressed, the written contract is identical with the terms of the verbal agreement, and there was no objection to the written contract and it was

executed that way. It was executed the same day and there were no long discussions about it. Mr. Gee also covers the fact that Mr. Hurley is dead, Mr. Sellery is dead and Mr. Firmin is dead to his personal knowledge. I think that about summarizes it. [396]

Mr. Everett: The only further thing, Mr. Donovan, is Mr. Gee testifies contrary to Mr.—the proposed testimony of Mr. Jones as to the form of the contract and as to the wording the defendants here say was a special wording, and Mr. Gee says that wording came from contracts that he had drafted earlier and he attaches to his deposition and makes a part thereof an agreement dated June 16th, 1922, between the Sunburst Oil and Gas Company and the Ohio Oil Company, which is the day following the agreement with Mr. Jones' Syndicate, and he also attaches photostatic copies of a contract of September 15, 1920, which is two years prior that has the identical wording in it that appears in the contract in suit. Now I take it, Mr. McCabe, you have no objection to these contracts not being the originals?

Mr. McCabe: Oh, no, those copies are attached to the deposition of A. M. Gee are copies of the original.

Mr. Everett: That is correct.

The Court: What is the purpose? Is that informing Mr. Jones and anybody else interested in the kind of contracts the Ohio were entering into in that field?

Mr. Everett: No. Mr. Jones testified certain

wording in the Troy Sweet Grass contract was put in there at his special instance and request and Mr. Gee says that is not so; he says he drafted these contracts: "I drafted these contracts and I followed the same wording I have been using [397] for two years prior to that." And here is the contract to show.

The Court: I see it.

Mr. Everett: Mr. McCabe is raising no objection insofar as these contracts not being the original.

Mr. McCabe: That is true as to the correctness of those exhibits, of those photostatic copies referred to in Mr. Gee's deposition; those are true copies.

Mr. Everett: What I am asking about is the best evidence rule; you are not going to insist on this?

Mr. McCabe: No, they are secondary evidence. Of course, there are other legal questions.

Mr. Everett: I understand you reserved your other objections.

Mr. Donovan: We have had a number of stipulations admitting facts that are pleaded in the defendant's answer and I presume they ought to be offered in evidence. We offer in evidence the stipulation filed in this case November 7th, which was drawn and executed at Mr. McCabe's request, defining the respective positions with the Ohio Oil Company which Mr. Sellery, Mr. Yealy, Mr. McCracken, Mr. Billstone, Mr. Firmin and Mr. Hungerford and Mr. McFayden, and the period that they held these respective positions.

Mr. McCabe: No objection.

The Court: Is it in the case in any way?

Mr. McCabe: It was filed in this court in November, [398] 1949.

The Court: They may be received in evidence.

Mr. Donovan: We offer in evidence stipulation of facts admitted which was filed in this court August 29th, 1949, and contains four pages and ten paragraphs.

Mr. McCabe: No objection. I think they are already a part of the record.

Mr. Donovan: Well, some parts are already a part of the record. We offer in evidence a stipulation—no, this not a stipulation. It is additional facts admitted by the plaintiffs consisting of seven pages and filed in this court December 14th, 1949.

Mr. McCabe: No objection.

The Court: It may be received.

Mr. Donovan: Pursuant to the rules of procedure the defendants admit the plaintiffs' Potlatch Oil and Refining Company certain interrogatories, 10 interrogatories, 9 of which have been answered and the 10th one counsel filed objections to it. I offer in evidence the interrogatories and answers so far as given which include statement of monthly payments made by the Ohio Oil Company to Potlatch Oil and Refining Company during the period of the Ohio's operations.

Mr. McCabe: No objection.

The Court: It may be received in evidence.

Mr. Everett: Mr. McCabe, will you also [399] stipulate that the same payments were made at

about the same time in so far as Inland Empire Oil and Gas Syndicate is concerned?

Mr. McCabe: Approximately.

Mr. Donovan: You mean approximate time?

Mr. McCabe: Yes, there is no objection to that. That is correct. That is the facts.

The Court: It may be understood.

Mr. Everett: We offer in evidence Defendant's Exhibit T, being a certified copy of the dissolution of Troy Sweet Grass Oil Syndicate, which is acted on July 18th, 1925, and properly certified to by the County Clerk and Recorder of Toole County, Montana.

Mr. McCabe: We have no objection. It is admissible.

The Court: It may be received in evidence.

Mr. Everett: To corroborate Mr. Gee's testimony we offer Defendant's Exhibit U; it is a contract dated September 15, 1921, between the Ohio Oil Company and Blackstone Petroleum Company.

Mr. McCabe: To which we object upon the grounds and for the reason that the exhibit is incompetent, irrelevant and immaterial; no proper foundation has been laid for its admission; it relates to a collateral contract not affecting any of the parties to this action or affecting the land involved in this action.

The Court: What is it? What is the purpose of it? [400]

Mr. Everett: It has the identical wording that the suit contract has and that the other contracts have that are attached to Mr. Gee's deposition.

The Court: Then it would have some reference to the deposition of Mr. Jones in respect to the language he says he proposed?

Mr. Everett: That is right, it would be in conflict, his testimony, and corroborate Mr. Gee's testimony.

Mr. McCabe: But he was not a party to this. If your Honor please, this is purely hearsay evidence.

The Court: Who was not a party?

Mr. McCabe: This is Blackstone Petroleum Company and The Ohio Oil Company.

The Court: That is one of The Ohio Oil contracts?

Mr. Everett: Yes, sir.

The Court: For the purpose of comparison of what was said or in support of what Mr. Gee testified to I think it would be admissible on that point alone. It shows that was the sort of contract Ohio Oil Company was drawing in the field. You have already got two or three others, haven't you?

Mr. Everett: Yes, sir.

The Court: And this is simply along the same line, isn't it?

Mr. Everett: That is right, and there were possibly some more. [401]

The Court: I think that purpose on that purpose alone I will admit it in evidence.

Mr. Everett: That is the purpose for which it is offered, your Honor.

The Court: Yes.

Mr. McCabe: Received subject to my objection? I see no purpose.

The Court: Yes, overrule your objection on that point.

Mr. Everett: Now, to show the general custom in the area with reference to matter of charges I have an operating agreement dated March 1st, 1923, between the Carter Oil Company and John T. O'Neil and F. A. Oulton, covering lands described therein as the SW $\frac{1}{4}$ of Section 2 and the NW $\frac{1}{4}$ of Section 11, Township 35 North, Range 2 West of the Montana meridian. The original agreement I have been unable to locate, your Honor. It is out of the State and I have had diligent search made by the Carter Oil Company and by my company who had an interest in the lease at one time and they have been unable to find it, and I don't know that Mr. McCabe has any objection to this from the standpoint of secondary evidence rule but I would respectfully ask him to waive that.

Mr. McCabe: I don't know. If you made this copy, or, in other words, I don't object——

Mr. Everett: I can state the copy was made from [402] the original that was in our files about fifteen years ago and that is——

Mr. McCabe: Well, as far as its being a copy of this purported agreement I have no objection to that, but I do object to the admission of the exhibit.

The Court: I think you have that in the record already, the charges of other companies; haven't you, some evidence?

Mr. Everett: I don't believe we have.

The Court: Well, that is all really a part of an accounting.

Mr. Everett: It is the matter of custom of the business and the interpretations of the contract itself, and we are offering it to support our position that the wording Mr. McCabe contends is convincing to support our contention it is not ambiguous. Now, I call the Court's attention to this wording at page 5 of Defendant's proposed Exhibit V, it says: "It being extremely understood that the limit of his liabilities shall be the value of his certain production and equipment interests." Now, the way it is stated in the Ohio contract is: "But in no case shall the parties be held beyond his interest in the production or equipment of the lease." It is the same principle said in a different way, and we offer that as being an operating agreement and was entered into on or about the time and by companies not [4033] related in any way to The Ohio Oil Company showing the custom and practice with reference to this type of operations at that place and time.

The Court: Where was the land situated with reference to the land in this suit?

Mr. Everett: The lands in this suit are not, I won't say it is in the same field, your Honor. The lands in suit here are in Township 35 and 36 North, I believe that is correct, and I believe was in range 2 West. These lands are in Township 35 North, Range 2 West. I mean they are all in the same Township and Range or next to the ad-

joining Township and Range of the lands in question. I have offered it in evidence.

Mr. McCabe: The Plaintiffs object to the exhibit offered by the defendants upon the grounds and for the reason that there is no proper foundation laid for its admission; that it is wholly incompetent, irrelevant and immaterial. The terms of the two contracts are not identical. They relate to different parties and to different lands, and it is not a proper method of proving custom in the business, the business practices, if that is the purpose of it. Of course, I make no objection, if your Honor please, or exclude from that objection the proposition that it is a carbon copy and not the original.

Mr. Everett: It is a photostatic copy. [404]

Mr. McCabe: I should say photostatic copy.

The Court: Well, the Court will consider it later subject to your objection.

Mr. Everett: Call Mr. W. H. McGrath.

W. H. McGRATH

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Everett:

Q. Will you please state your name?

A. W. H. McGrath.

Q. Your present employment?

A. With The Ohio Oil Company.

(Testimony of W. H. McGrath.)

Q. How long have you been employed by The Ohio Oil Company?

A. Since November, 1927.

Q. What is the nature of your employment, the character of your duties with the company?

A. I am in the accounting department.

Q. What part of the accounting department work is in the Casper Division?

A. The Division accounting.

Q. Division accounting at Casper, Wyoming?

A. Rocky Mountain Division. [405]

Q. And you have been employed in that division it would be since 1926? A. 1927.

Q. Did you at my request make a search of all of the old files of The Ohio Oil Company in Casper, Wyoming, relating to operations on the Baker and Sindon leases, that is, the I. H., Irving H. Baker lease, covering the SE $\frac{1}{4}$ of Section 4, SW $\frac{1}{4}$ of Section 3, Township 35 North, Range 2 West, Toole County, Montana? A. I did.

Q. And also covering the Israel Sindon lease embracing the north half of Section 1, Township 35 North, Range 2 West, Toole County Montana?

A. I did.

Q. Did you make a similar search?

A. I did.

Q. Of all files and correspondence relating to those two leases? A. Yes, sir.

Q. In the division office at Casper did you make a similar search for all correspondence with respect to the Oliver O'Hannon lease, covering the east half

(Testimony of W. H. McGrath.)

of the west half and the west half of the east half of Section 26, Township 36 North, Range 2 West, and the Baptise Sindon lease, covering the south half of Section 1, Township 35 North, Range 2 West, and the Newt Haskin lease of Toni Haskin lease it is sometimes called, covering the south half of Section 25, Township 36 North, Range 2 West?

A. Yes, the Oliver O'Hannon, the B. Sindon and Haskin lease. [406]

Q. Yes. A. I did.

Q. You searched all those files?

A. Yes, sir.

Q. In your search of those files did you find any letters of complaint therein with reference to charges made by the Ohio accounting against the interests of Troy Sweet Grass Oil Syndicate?

A. No, sir, I did not.

Mr. Everett: We offer in evidence Defendant's Exhibit W, a map of the Sweet Grass Arch Field, Toole County, Montana, showing thereon the locations of the leases thereon referred to.

Mr. McCabe: For what?

Mr. Everett: For illustrative purposes in connection with the witness here in examination.

Q. Handing you Defendant's Exhibit W——

The Court: That is the one referred to before; it was just marked and received in evidence?

Mr. McCabe: Yes.

Q. Your testimony just given refers to the leases shown on Defendant's Exhibit W, is that correct? A. That is correct.

(Testimony of W. H. McGrath.)

Q. In your search of the files of The Ohio Oil Company in the Casper office did you find any complaint from the Potlatch Oil and Refining Company with respect to the Oliver O'Hannon and the Baptise Sindon leases? A. No, sir.

Mr. Everett: You may have the witness. [407]

Cross-Examination

By Mr. McCabe:

Q. Mr. McGrath, to shorten up the cross-examination, I understand from your testimony that you searched the records and files of The Ohio Oil Company but didn't find what you call any complaints concerning these leases which you have referred to?

A. No, that is not what I testified, Mr. McCabe.

Q. Now respecting those complaints which you were looking for, did you know whether any other complaints had been made and filed in any other offices of The Ohio Oil Company?

Mr. Everett: I object to the question. He examined only the files at Casper.

Mr. McCabe: Division headquarters?

Mr. Everett: Division headquarters at Casper.

Q. You made no search of any other files of The Ohio Oil Company other than those you testified to? A. No, sir.

Mr. McCabe: That is all.

(Testimony of W. H. McGrath.)

Redirect Examination

By Mr. Everett:

Q. And the records in the Casper Division, they also [408] included, did they not, the records which were previously filed in the field office at Shelby, Montana? A. Yes, that is right.

Mr. McCabe: To which we object on the ground and for the reason the witness has not shown himself qualified to answer, no proper foundation has been laid.

The Court: All right, qualify the witness.

Q. (By Mr. Everett): Do you know whether the records of The Ohio Oil Company at Shelby, Montana, were transferred to Casper at any time?

A. They were.

Q. Can you state about when they were so transferred?

A. I would say—that I can't answer correctly but I think it was in 1943.

Q. But you do know they were so transferred?

A. I do know that I have seen them and I went all through them.

Q. And you examined those records so your testimony is the same or included in your testimony in regard to records in the Casper office?

A. Yes, sir, I went through those records.

(Testimony of W. H. McGrath.)

Recross-Examination

By Mr. McCabe:

Q. Mr. McGrath, did you personally handle the moving of those records from the Shelby office to the Casper office? A. No, sir.

Q. You rely upon in your testimony from what is told you by some other third person?

Mr. Everett: We object; he is trying to badger the witness.

The Court: In regard to the correspondence and so forth that were transferred, and I think from his testimony they knew they belonged to the office before they came under him at Casper, is that the situation?

A. That is right, sir.

Q. You could identify them, couldn't you from appearance? A. Yes, sir.

Q. And contents that they belonged to your Shelby office?

A. Yes, sir. I believe they came down in the original file that was in Shelby. They were left in the containers and wrapped and sent to Casper from the Shelby office in their original containers.

The Court: Well, go ahead along that line.

Q. (By Mr. McCabe): I understand from your testimony, and correct me if I am misstating it, that of your own personal knowledge you [410] don't know whether the records from the Shelby office were the same records which you examined at Casper?

(Testimony of W. H. McGrath.)

A. I didn't see the records in Shelby, Mr. McCabe.

Q. So that for your information you rely upon statements made to you by other persons?

Mr. Everett: I object to that——

A. No, I didn't.

Mr. Everett: There is no testimony about statements from other persons. He testified he saw the file and he knew it was the original file that was transferred; and he has not testified those were all the records from Shelby; he testified the records at Casper which included records of the Casper office also included records as he found therein that had been transmitted from Shelby.

Q. Upon that information do you testify that the records that you saw in Casper were the original files of the Shelby office?

A. Because I recognize the type of files that are kept in the field offices.

Q. So that other than the markings on those files which correspond with files kept generally by the company in the field offices you have no other information as to the identity of those records from the Shelby office as being the original records in that office?

A. When you say files, Mr. McCabe, do you mean file [411] cabinets or contents?

Q. I refer to the contents.

A. I recognized the contents as the kind of papers and records we do keep in our field offices.

Mr. Everett: Did you see in there any original

(Testimony of W. H. McGrath.)

letters addressed to Mr. L. J. Yealy by the Inland Empire Oil and Gas Syndicate or the Potlatch Oil and Refining Company?

A. Yes, I did.

Q. (By Mr. McCabe): But still you don't answer my question, other than what you have testified from the appearance of the files in the Shelby office that appear to be files from the Shelby office which were among the files in the Casper office? You don't know whether those files in the Shelby office or in the Casper office which you call or identify as original files from the Shelby office were or were not the original files from the Shelby office?

A. I have no way of knowing that, Mr. McCabe.

Mr. McCabe: That is all.

Mr. Everett: That is all. [412]

JOHN MORRISON

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Everett:

Q. Please state your name.

A. John Morrison.

Q. Where do you live? A. Findlay, Ohio.

Q. By whom are you employed?

A. Ohio Oil Company.

(Testimony of John Morrison.)

Q. How long have you been so employed?

A. Thirty-two years.

Q. When did you start working for the company? A. 1917.

Q. In the Findlay office?

A. Findlay office.

Q. That is the main office of the company?

A. Main office.

Q. And you are employed there at the present time? A. Right.

Q. What have been the nature of your duties in connection with your employment for The Ohio Oil Company during that period? Just tell us about it in your own words.

A. I have been in the producing accounting department all during this period of time, 32 years.

Q. And what is your present position?

A. Analyst.

Q. What kind of analyst, accounting analyst in connection [413] with production?

A. That is right.

Q. Joint interest accounts?

A. Joint interest accounts.

Q. And the interpretation of contracts and application of accounting principles thereto?

A. Right.

Q. How long have you been doing that type of work? A. Five years.

Q. You have been head of that department for five years? A. Right.

(Testimony of John Morrison.)

Q. And prior to that time were you an assistant in that department?

A. Assistant department head, accounting department.

Q. Assistant accounting department head. Mr. Morrison, I will ask you, referring to Plaintiff's Exhibit W, which I hand you, whether you have checked all of the files in The Ohio Oil Company home office with respect to the leases designated on Exhibit W, as follows: Thomas Anderson, Cora B. Phillips, Harry W. Phone, Oliver Hannon, Knut Kaskin, also known as Toni Kaskin, Isarel Sandan, Baptiste Sandan, and Irving H. Baker? Have you checked all of the correspondence and other files of the company with respect to the accounting under those leases?

A. I have searched those files.

Q. In your search did you find therein any complaints from the Troy Sweet Grass Oil Syndicate with respect to any [414] accounts which were returned to that company during the time it was a joint interest owner under part of these leases?

A. I did not.

Q. In your search of the files did you find any complaint or objections with reference to accounting in the Potlatch Oil and Refining Company, or statements of account, charges, credits, and so forth with respect to the leases designated as the Oliver Hannon and as to the Baptiste Sandan leases?

A. I recall of no objection to the accounting, no, sir.

Q. On those two?

A. On those two.

(Testimony of John Morrison.)

Q. Did you find any in the files, any objection from the Troy Sweet Grass Oil Syndicate with respect to the accounting covering the Knut Kaskin lease, being the south half of Section 25, Township 36 North, Range 2 West?

A. I recall finding no objections.

Q. I have here Plaintiffs' Exhibit D, which are all of the Ohio interest accounts to the Troy Sweet Grass Oil Syndicate. I will hand these to you and ask you if you recognize them as the original statements which were sent to that company on or about the dates indicated therein? A. I do.

Q. And they are the originals?

A. They appear to be the originals.

Q. I will ask you to look at some of these statements, undo them if you like, and state whether the categories or [415] summarization of charges are the same in these accounts as in the subsequent statements of account of Potlatch Oil and Refining Company and to Inland Empire Oil and Gas Syndicate, if you know? Pick out what you consider a representative statement and give us your testimony with reference to those items. Take, for example, the summary sheet for some month there you think is representative.

A. I would say this is one, February 28, 1923.

Q. February 28, 1923, statement to the Troy Sweet Grass Oil Syndicate and it was thereon a summary of charges and credits. Will you please state what categories or items are listed in the

(Testimony of John Morrison.)

summary of charges against the account of Troy Sweet Grass Oil Syndicate?

Mr. McCabe: Your Honor, the statements are the best evidence. They speak for themselves and they are all admitted in evidence, and it looks to me that this is all repetition and wholly immaterial.

Mr. Everett: Well, we don't need to go into it. We can compare the statements. This man is the man who has done the work and I thought you might like to know about it, and he will testify they are the same items in this accounting and subsequent accounting, and if counsel is satisfied——

Mr. McCabe: Just a minute, and which I think it is all repetition and it is not the best evidence. The statements, themselves, are the best evidence of their contents. [416]

Mr. Everett: This testimony is these categories and items here on this account are the same as on the subsequent accounts of Potlatch and to Inland Empire Oil and Gas Syndicate as to the Baker and Sindon leases, is that correct?

A. Correct.

Q. (By Mr. Everett): Were these same items of the charges included in the accounting to Potlatch Oil and Refining Company with respect to the Oliver Hannon and B. Sindon leases?

A. They are the same.

Q. Referring to Plaintiffs' Exhibit E, what do these refer to in your accounting department?

A. Those are the remittance slips.

(Testimony of John Morrison.)

Q. And what is the purpose they accompany the checks, is that right, accompany the remittances?

A. These are made for the purpose of the disbursing department issuing the check therefrom.

Q. And in payment of the amount shown thereon?

A. Right.

Q. And these accompany the monthly statements whenever there is a credit balance?

A. That is right, together with the check.

Q. Do you know of your own knowledge that such a statement accompanied each and all of the transmittals of checks to the Potlatch Oil and Refining Company and to the Inland [417] Empire Oil and Gas Syndicate for each of the months that they had a credit balance? A. They did.

Mr. Everett: I think Mr. Gerlough already testified they received them and I just want to prove we sent them, your Honor.

Q. And those statements were all in substantially the same form as I am showing you in Plaintiffs' Exhibit E? A. That is right.

Mr. Everett: You may have the witness.

Cross-Examination

By Mr. McCabe:

Q. Mr. Morrison, do I understand from your testimony you intend to convey the impression that all statements that were mailed and sent out covering the operations under the operating agreement involved in this action and were sent to Potlatch

(Testimony of John Morrison.)

Oil and Refining Company and Inland Empire Oil and Gas Syndicate were identical in amounts, or, no, identical in items of expenditures charged as appears in the Troy Sweet Grass statements which you just examined?

A. In substance they were the same. The same structure was used in preparing the bills.

Q. And have you made a detailed examination recently of these statements that were mailed to the Potlatch Oil and [418] Refining Company and Inland Empire Oil and Gas Syndicate?

A. I examined a few of them.

Q. Didn't you find there were any charges or items of expenditures listed on subsequent statements given to Potlatch and Inland Oil and Gas Syndicate as to make a substantial difference from the items that appear in the statements issued to the Troy Sweet Grass Oil Syndicate?

Mr. Everett: What are you referring to? You might apprise the witness and tell him to what item you refer, referring to camp expense, water expense.

Mr. McCabe: Well, he said he examined these statements. I want information to see what he knows about it.

Mr. Everett: Do you want him to examine them now, Mr. McCabe? They are right here; he can examine them.

The Court: He can answer the question. It is rather broad and comprehensive and it covers so much territory I don't know whether he can answer

(Testimony of John Morrison.)

it or not; conditions may have arisen from time to time that brings up some other charge or some other thing. It is hardly a fair question. You better rephrase it, if there are actual differences there that are important or material.

Mr. McCabe: The statements speak for themselves so I will withdraw the question, your Honor.

Mr. McCabe: That is all. [419]

Redirect Examination

By Mr. Everett:

Q. Your testimony was the same general charges are the same on both? A. That is right.

Q. On all the accounting on the statements of account? A. Yes, sir.

Mr. Everett: That is all.

The Court: Any further questions?

Mr. McCabe: No further cross-examination.

Mr. Everett: That is all. The defendant rests, your Honor.

Mr. McCabe: Mr. Gerlough, will you take the stand and bring your minute book of the Inland Oil and Gas Syndicate?

Mr. McCabe: This, your Honor, is very short and in fact it is the only witness I have. I have just got an exhibit.

JEAN P. GERLOUGH

resumed the stand and testified as follows:

Direct Examination

By Mr. McCabe:

Q. Mr. Gerlough, you are the same Jean P. Gerlough [420] who testified in this proceeding?

A. That is right.

Q. Will you please produce the minutes of the meetings of the Inland Empire Oil and Gas Syndicate?

A. I have them here.

Q. Have you examined those minutes to determine whether or not there was any written form purporting to be a resignation of Kenneth Luke as a trustee or secretary of the Inland Empire Oil and Gas Syndicate?

A. Kenneth Luke was not, never was a trustee of the Inland Empire; you are thinking of the Troy Sweet Grass.

Q. Now, have you the minutes of the Troy Sweet Grass Oil Company with you?

A. Yes, I have.

Q. Will you please produce them?

A. Yes.

Q. Have you in those minutes any record, what purported to be a record of the resignation of Kenneth Luke as secretary of the Troy Sweet Grass Oil Company?

A. Yes.

Q. And is that record in the form of a letter to the Syndicate?

A. Yes, it is; it is a letter to the Board of Trustees.

(Testimony of Jean P. Gerlough.)

Q. Showing you Plaintiffs' proposed Exhibit X, do you know whose signature that is that appears thereon, there at [421] the right, whose writing it is?

A. It is the signature of Kenneth G. Luke in his own handwriting.

Q. And do your records show what action the board took on the resignation? A. Yes.

Q. And what do the minutes show? If you will just read into the record what the minutes show with respect to the action?

Mr. Everett: Wait a minute. May I see the minutes before you read it for the record?

Mr. McCabe: Yes. I am sorry.

Mr. Everett: What is it you want to show?

Mr. McCabe: To show that the resignation of Kenneth Luke as secretary of the Troy Sweet Grass Oil Syndicate was acted upon and accepted by the board of trustees of the Troy Sweet Grass Oil Syndicate on October 27, 1922.

Mr. Everett: No objection.

Q. And will you read into the record that part of the minutes which shows the action of the board?

A. The resignation of Kenneth G. Luke as secretary of the Syndicate was read and upon motion accepted.

Mr. McCabe: We now offer in evidence Plaintiffs' Exhibit X, being the original resignation of Kenneth Luke as secretary of the Syndicate. [422]

Mr. Everett: No objection.

The Court: It may be received in evidence.

(Testimony of Jean P. Gerlough.)

(Whereupon, said Plaintiffs' Exhibit X, offered and received in evidence, is a part of this record.)

Mr. McCabe: Mark that for identification.

Mr. Everett: What is the purpose of this, Mr. McCabe?

Mr. McCabe: The purpose of this is to contradict the testimony existing in the deposition of A. M. Gee to the effect that The Ohio Oil Company in all its contracts where there were other parties to the contract participated in the expense of the operation and in the proceeds; that all those contracts contain the same provision with respect to limitation of charges, final charges against the other party to the interest in the equipment and the production from the land.

Mr. Everett: We object——

Mr. McCabe: And this purpose this is a court record from the United States District Court from the District of Wyoming, and which is a certified copy of an operating agreement made by the, The Ohio Oil Company and shows in which there was participation in expenses and in proceeds, and this contract has no such clause as testified to by Mr. Gee.

Mr. Everett: Well, we will further object to it. The agreement is dated December 7, 1917, and long prior to [423] this, and he has not shown any connection of Mr. Gee with the company at that time, and I would like to read to the court in con-

nection with that exactly what Mr. Gee said about that. I can't read it the same way Mr. McCabe did.

The Court: It was several years before The Ohio Oil Company——

Mr. Everett: It is five years before the contract with Troy Sweet Grass.

The Court: In another State under different conditions and circumstances. I don't know how that would apply here. Well, let it go in under the objection and we will see, but I don't see any application without showing similar conditions and circumstances. I won't just say peremptorily.

Mr. Everett: We will discuss the law on that on the briefs.

Mr. McCabe: The plaintiffs rest.

Mr. Everett: May it please the court, we would like to present to the court a motion for judgment at this time, and we have dictated it and it is being prepared now, and if we could come back at two o'clock and present it to the court, we would like to do that, or two-thirty.

The Court: Oh, well, you better make it two thirty and you can present it and the court will take it under advisement. Court will stand in recess until 2:30 this afternoon. [424]

(Court resumed, pursuant to recess, at 2:30 o'clock p.m., at which time all counsel were present.)

The Court: I suppose both you gentlemen want to make a motion, don't you? Do you want to make

your motion for the plaintiffs, Mr. McCabe; you want to move first?

Mr. McCabe: At this time, if your Honor please, the plaintiffs move for judgment in favor of the plaintiffs and against the defendants for a judgment of accounting to be made by the defendant to the plaintiffs in accordance with the prayer in plaintiffs' complaint, upon the grounds and for the reasons that under the evidence introduced and uncontradicted, such evidence together with the stipulations of fact and the admissions of fact in the respective pleadings of the parties show clearly that the plaintiff is entitled to the judgment prayed for, and for the further reason that the so-called, that the affirmative defenses of laches, accounts stated and limitations of actions have been established by the evidence introduced here without objection are wholly devoid of merit.

The Court: Now Mr. Everett.

Mr. Everett: May it please the court, I have prepared a motion in writing and have filed it with the clerk. If the court wishes me to read it, I will do so, but if the filing is sufficient——

The Court: I would like to hear you read [425] it.

Mr. Everett: "Comes now the defendant"——

Mr. Everett: You don't need to take this, Mr. Reporter.

(Whereupon, Mr. Everett read the motion.)

Mr. Everett: Let the record show I have handed Mr. McCabe a copy of the motion.

The Court: Very well, both motions will be taken under advisement. I suppose you gentlemen would like about thirty days on the side for briefs after receipt of the transcript.

Mr. McCabe: Your Honor, I would like thirty days if the plaintiff may have it to submit a brief.

The Court: What is that?

Mr. McCabe: I would like thirty days on behalf of plaintiff to submit a brief.

The Court: Will thirty days be enough?

Mr. Everett: Well, off the record, I think we can do it within thirty days after we get the plaintiffs' brief. I have to make a trip to Washington and one to Chicago and expect to be out of town most of the time.

The Court: It will be some time before I would get around to considering this case in view of the engagements I have and other cases to decide already on hand. If you need more than that, of course, I will grant an extension and you may have such time as you feel you need. If you need more than [426] thirty days just send a note, and the same with Mr. McCabe if he needs more than thirty days.

Mr. Everett: Would it be satisfactory to say plaintiffs have until February 1st to file their brief and we have thirty days thereafter?

Mr. McCabe: That is agreeable.

Mr. Everett: He says that is agreeable.

The Court: That will depend on when you receive the transcript. You won't want to commence the brief until you receive the transcript.

Mr. Everett: Let's put it this way, your Honor, thirty days after he receives the transcript he shall have thirty days after that to file his brief and we shall have thirty days after receipt of copy of his brief for defendants.

The Court: And then we will give Mr. McCabe twenty days for reply.

Mr. McCabe: Yes, your Honor. Thank you.

The Court: Court is adjourned.

(2:45 o'clock p.m., December 23, 1949.) [427]

Reporter's Certificate

United States of America,
State of Montana—ss.

I, Sidney O. Smith, do hereby certify that I am the Official Court Reporter in the above-entitled court; that the foregoing and annexed transcript is a full, true and correct transcription of the testimony taken and proceedings had, which was taken in phonography and transcribed in longhand by me, in the case of Potlatch Oil and Refining Company, a corporation, etc., Plaintiffs, vs. The Ohio Oil Company, a corporation, Defendant, at Great Falls, Montana, on December 22nd and 23rd, 1949.

Dated this 14th day of February, 1950.

/s/ SIDNEY O. SMITH,
Official Court Reporter.

[Endorsed]: Filed February 14, 1950. [428]

[Title of District Court and Cause.]

DEPOSITION OF T. P. JONES

Be it remembered that pursuant to stipulation of the above-named Plaintiffs and Defendant, a duly certified copy of which stipulation is hereunto annexed, and on the 14th day of November, 1947, at Spokane, State of Washington, before me, Geo. Stewart, a Notary Public in and for the State of Washington, duly appeared T. P. Jones, also known as Thomas P. Jones, a witness produced on behalf of the Plaintiffs in the above-entitled action now pending in the above-entitled court, who, being first by me duly sworn, upon oath was then and there examined and interrogated by E. J. McCabe, of counsel for said Plaintiffs, and by W. H. Everett and Louis P. Donovan, of counsel for the Defendant, and testified as follows: [430]

T. P. JONES

being first duly sworn to tell the truth, the whole truth and nothing but the truth in the above-entitled cause, was examined as a witness on behalf of the Plaintiffs, and testified as follows:

Direct Examination

By Mr. McCabe:

Q. Please state your name, age and place of residence.

A. Thomas P. Jones, eighty-five, Boville, Idaho.

Q. Are you also known as T. P. Jones?

(Deposition of T. P. Jones.)

A. T. P. Jones.

Q. And in signing your signature or affixing your signature, do you use the initials T. P. Jones?

A. Yes.

Q. Mr. Jones, were you ever in Shelby Montana? A. I was.

Q. Did you ever have a place of residence at Shelby, Montana? A. I had an office there.

Mr. Everett: Before we go on, I want to state this:

Mr. McCabe: Yes, go ahead.

Mr. Everett: For the purpose of the record, the Defendant Ohio Oil Company wishes to state that all plaintiffs herein have heretofore stipulated that each and all of the defendant's objections as to relevancy, materiality and competency of the testimony of plaintiffs' witness T. P. Jones have been expressly reserved. I understand that upon any trial in which said deposition is permitted to be used, that the presentation thereof will be by question so that [432] defendant will thereby be afforded and shall have the unrestricted and unqualified right to make any objection it wishes as to each such question so presented, this without prejudice to any right defendant may have or wish to assert as to the entire deposition. For example, the entire deposition should be stricken from the files if it appears therefrom or from the files, pleadings or records in this case that this is an attempt to open up a stated account or to vary the terms of a written contract by parol evidence, or that it

(Deposition of T. P. Jones.)

violates the rules which do not permit testimony as to conversations or transactions with any deceased employee or agent of the defendant, or that it appears that the transactions complained of have been ratified or confirmed, or that the statute of limitations or laches or stale demand has barred any right of recovery, or that plaintiffs are estopped, or if for any reason such deposition should be stricken in its entirety. If this is a correct statement of our understanding, Mr. McCabe, then we do not expect to assert our specific objections to each question as it is asked and as the testimony is given, and I think the deposition can be materially shortened.

Mr. McCabe: That is my understanding, Mr. Everett, but subject, of course, that I am not waiving any right as to a waiver by you of the form of objection as to the form of the objection as stated in the stipulation.

Mr. Everett: The form of question, you mean?

Mr. McCabe: Yes. I mean the form of question.

Mr. Everett: Yes, the stipulation does provide that we may object to the form of the question.

Mr. McCabe: Yes. I am not waiving the provisions of [433] the stipulation.

Mr. Everett: We understand that we are to make our objections as to the form of the questions and that you will take care of them now.

Q. (By Mr. McCabe): Where was your residence at the time that you had the office in Shelby, Montana?

(Deposition of T. P. Jones.)

A. My home residence was in Bovill, Idaho.

Q. That has always been your home residence?

A. For forty-odd years.

Q. Did you ever hear of Troy-Sweet Grass Oil
Syndicate? A. I did.

Q. Were you ever connected with that syndicate
in any capacity? A. I was.

Q. What was your connection?

A. I was a trustee and president of it, manager.

Mr. Everett: We object to the form of the ques-
tion until you establish the time and place.

Q. (By Mr. McCabe): And during what years
would you say you were connected with the Troy-
Sweet Grass Oil Syndicate?

A. In the late fall of '21 until it was dissolved
in, I think, '23 or '24.

Q. And by "'21," do you mean the year 1921?

A. 1921.

Q. While you were connected with that Troy-
Sweet Grass Syndicate and on or about the 15th
of June, 1922, did you sign the written instrument
designated "Operating Agreement"?

A. I did.

Q. And was this instrument one in which The
Ohio Oil Company was a party? [434]

A. Yes.

Mr. Everett: We assume that you are going to
introduce this instrument in evidence?

Mr. McCabe: Yes.

Mr. Everett: Otherwise, we want to raise the
objection that it is not proper examination.

(Deposition of T. P. Jones.)

Mr. McCabe: Yes, I am going to introduce it. I am just leading up.

Q. Showing you a writing marked for identification Plaintiffs' Exhibit 2, I wish you would examine that. Have you examined the instrument?

A. I have.

Q. And also examined the document attached to it and designated "Assignment"?

A. Yes, sir.

Mr. Everett: May I see those?

Mr. McCabe: Yes.

(Exhibit handed to counsel.)

Q. Did you sign the original of which the exhibit is a copy? A. I did.

Q. At the time of the signing of the original of the exhibit were you acquainted with A. M. Sellery of the Ohio Oil Company?

A. I never saw him before the day I signed it.

Q. But on the date that you signed it, did you meet him at that time? A. Yes, sir.

Q. Did you know a Mr. F. E. Hurley?

A. I met him the same day.

Q. And did this Mr. Hurley purport to be with the Ohio [435] Oil Company? A. He did.

Q. Did you on the same day meet a man by the name of G. Gee, who purported to act as attorney for the Ohio Oil Company?

A. Yes, I did; him and Mr. Hurley.

Q. And at that time did Mr. Hurley and Mr. Gee come in together?

(Deposition of T. P. Jones.)

A. Yes, they came in my office together.

Q. Where did you see them?

A. They came in to my office to see me.

Q. And by your office, do you mean the office of the Troy-Sweet Grass Oil Syndicate?

A. Yes, in Shelby, Montana.

Q. Was Mr. Sellery there on that day with Mr. Hurley and Mr. Gee at any time?

A. He either came right in with them or right after them. I wouldn't say which.

Mr. Everett: I think if you could ask him about the signature of those parties there, the rest of this is wholly immaterial, Mr. McCabe.

Mr. McCabe: Yes, I will. I was just leading up to that.

Q. Did Mr. Hurley sign the original of the exhibit on that date?

Mr. Donovan: Mr. McCabe, we will have to object to that as leading. Your questions are quite leading.

Mr. McCabe: Well, of course, this is not a trial before the Court. I think the leading question is not very material, but I will try to conform to your suggestion. [436]

Q. Do you remember who signed the original of this exhibit with you at the time?

A. Mr. Hurley.

Q. And do you know of anyone else that signed it at that time?

A. Why, I think Mr. Sellery witnessed it; something like that.

(Deposition of T. P. Jones.)

Mr. Everett: That shows from the exhibit itself, doesn't it?

Mr. McCabe: Yes, it shows.

Q. Showing you the exhibit consisting of the operating agreement and the assignment, did you personally see Mr. Hurley and Mr. Sellery, whose name appears on there, sign the original?

A. Well, I was right in the room when we all signed it. I don't know as I was looking right at them, but they signed it right there.

Q. And after the operating agreement, the original of the Exhibit 2, designated "Operating Agreement" and the "Assignment" were signed by you and the other gentlemen whom you stated, what became of the original?

A. The original lease?

Q. No, the original operating agreement and the assignment, of which Exhibit 2 are certified copies.

A. One copy was retained by them and one copy was put in our files.

Q. And was the original typewritten copy retained by the Ohio Oil Company? A. Yes.

Q. And a carbon copy retained by the Troy-Sweet Grass? [437]

Mr. Everett: I object to that as a leading question.

Q. (By Mr. McCabe): Was there a carbon copy of the agreement—

Mr. Everett: We object to the form of the ques-

(Deposition of T. P. Jones.)

tion. The witness already testified that it was executed in duplicate and that each of them kept a copy.

Mr. McCabe: All right.

Q. And examining Plaintiffs' Exhibit 2, will you say that that exhibit, consisting of the documents marked "Operating Agreement" and "Assignment," was a copy of the original operating agreement and assignment which was signed on that date?

Mr. Everett: That is wholly incompetent for the reason that the instrument speaks for itself. It is the best evidence.

Mr. McCabe: I think it is. We now offer in evidence as part of the examination of this witness this Plaintiff's Exhibit No. 2.

Mr. Everett: No objection, except the general objection, as already stated.

Mr. McCabe: Yes, I understand.

(Whereupon, a Photostatic copy of an instrument entitled "Operating Agreement" and "Assignment," marked Plaintiffs' Exhibit 2, was received in evidence and is hereto attached and made a part hereof.)

Q. (By Mr. McCabe): At the time of the signing of the original instrument of which Plaintiffs' Exhibit 2 purports to be copies, did any one of the gentlemen direct your attention to any part of the operating agreement?

(Deposition of T. P. Jones.)

Mr. Everett: Wait a minute. Defendant objects to this [438] question and to any testimony in response thereto or any similar or related line of questioning and testimony for the reason that T. P. Jones, individually, is one of the assignors or owners or trustees of some of the leases and properties described in Plaintiffs' Exhibit 2 and in the Troy-Sweet Grass Syndicate, and is not competent to testify to any oral conversation, direct transactions or oral communications with Mr. F. E. Hurley, Mr. Art Sellery or Mr. John McFadyen, all of whom are deceased. In support of this objection, allow me to state that these men were agents and employees of the Ohio Oil Company and are now and have for many years been deceased. We also object to this question and to any testimony in response thereto and to any similar or related line of questioning and testimony for the reason that the written agreement which has been introduced in support of this deposition by plaintiffs shows that there was an agreement in writing between the parties and their representatives and successors in interest, no mistake or imperfection of the writing has been shown by the pleadings, nor is the validity of the agreement in fact in dispute. Mr. McCabe, may it be understood that our objections as to the incompetency of Mr. Jones, and also our objections as to the endeavor to vary the terms of a written instrument by parol testimony, that those two objections go to all questions and testimony offered?

(Deposition of T. P. Jones.)

Mr. McCabe: Yes, that is my understanding. That is agreeable.

(Last question read as follows:)

“Q. At the time of the signing of the original instrument of which Plaintiffs’ Exhibit 2 purports to be copies, did anyone of the gentlemen direct your attention to any part [439] of the operating agreement?”

Mr. Everett: We further object that the question is leading. If you can frame your questions so that they are not leading, Mr. McCabe, it will be helpful.

Mr. McCabe: I prefer to let it stand.

Q. Can you answer?

A. Why, yes. After he had rewritten the contract a couple of times, he brought it in and pointed out to me where he had put in the provisions that I asked for.

Q. Will you please refer to the exhibit or that part of the exhibit designated “Operating Agreement,” the part in Paragraph Three there——

Mr. Everett: Let’s not lead him. Let the witness do the testifying.

Mr. McCabe: That is not a leading question.

Q. Will you please indicate on that instrument what particular clause or phrase, or part of it, was called to your attention at that time. Just mark it with parentheses in pencil.

A. After rewriting——

(Deposition of T. P. Jones.)

Mr. Everett: Well, Mr. Jones, he asked you just to mark it.

Q. (By Mr. McCabe): If you will, just mark it in pencil.

A. All right. I will try that. You want a pencil mark on the part he drew my attention to. (Instrument so marked) I think that is it.

Q. Now, will you please read the part which you stated was specifically called to your attention by that person at that time. Just read it so it will go into the record.

Mr. Everett: It is understood our objections go to all [440] of this?

Mr. McCabe: Yes.

A. (Reading): "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands."

Q. (By Mr. McCabe): Now Mr. Jones, on the date that this instrument, the original of Plaintiffs' Exhibit 2, was signed by the parties named therein, did you have any conversation with Mr. Hurley and Mr. Gee with reference to entering into any arrangements for the drilling and development of lands of the Troy-Sweet Grass Oil Syndicate?

A. I did.

Q. And was that on the same day as the agreement was signed?

Mr. Donovan: I object to this as leading.

Mr. Everett: Let's let the witness testify, Mr. McCabe. You are insisting that we not have an ob-

(Deposition of T. P. Jones.)

jection to the form of the question, but still you insist on making the questions leading.

Mr. McCabe: I don't think that is leading.

Mr. Everett: Of course it is leading. You are on direct examination now. On cross-examination we can lead him all over the place, but you can't.

(Last question read.)

A. It was.

Q. (By Mr. McCabe): Now, what did Mr. Hurley or Mr. Gee in the presence of yourself and Mr. Gee and Mr. Hurley say to you in connection with——

Mr. Donovan: That is objected to as being uncertain. [441] It doesn't designate the person. It is also uncertain as to the place where the alleged transactions or conversations were had.

Q. (By Mr. McCabe): Where was the original of Plaintiffs' Exhibit 2 signed?

A. In my office in Shelby, Montana.

Q. And at that time who was present?

A. Mr. Hurley, me, Mr. Luke, my secretary—the secretary of the Troy-Sweet Grass and this other gentleman, Mr. Sellery. Mr. Hurley and Mr. Gee came in there and asked me to know if I could and would make an operating agreement on some land held by my company, that I represented, and I told them——

Q. Just a minute. Who was it asked you that—Mr. Gee or Mr. Hurley?

(Deposition of T. P. Jones.)

A. Mr. Hurley, after they introduced themselves.

Q. And what did you answer?

A. Well, I asked them—They described the land that they wanted to make an operating agreement on. I couldn't describe them right here now. And I told them that I had contacted the California a couple of times prior to that, or they had contacted me and wanted some lands on a fifty-fifty operating agreement, and presented me with a copy, which I read, and I objected, or told them what I would do; I would dictate the terms of the contract.

Q. What did you say to them in response to their inquiry whether you would be willing to enter into a deal?

A. Well, I told them that I would under my terms.

Q. Then what did they say to you?

A. They asked me what my terms were, and I explained them [442] to them.

Q. What did you tell them the terms were that you wanted?

A. I told them that I would enter into an agreement with them, but not where any expenses would be charged to this land off of the lease, of Findlay, Ohio, or any place else off of that lease, and so then, after a conversation of quite a while, why, Mr. Hurley, or one of them spoke up and said, "Well, the charges wouldn't be in excess of probably ten per cent," and I told them, "All right, gentlemen, if that is all it will be, I will give you

(Deposition of T. P. Jones.)

forty-five per cent and you can take fifty-five per cent, and you can pay the expenses, and put that into a lease, and we can make an agreement," and Mr. Gee said he would write up that kind of an agreement. I said, "There is a typewriter here and paper." He says, "I have a typewriter right over here, and I will go over and write it," which he did, and when he came back he had an operating agreement written up in duplicate. I think it was triplicate.

Q. A moment ago you said that in this conversation you told them you would give them the forty-five per cent, and also you said you would give them the fifty-five per cent.

A. No, I said I would give myself forty-five per cent and them fifty-five per cent.

Q. That is what I wanted to get straightened out.

A. If they would bear all of the expenses, in place of a fifty-fifty, and charge me only what operating expense was incurred right on the lease, and they said——

Q. Now, just a moment. Was there any particular form of expression that you used at that time as designated the [443] expenses chargeable?

A. Well, I said that their expenses would be charged all over the country, their overhead, the accounting and everything else would be charged up against that lease, and I had no way of keeping account of that.

(Deposition of T. P. Jones.)

Q. Was that under the fifty-fifty operating agreement? A. That was the fifty-fifty.

Mr. Everett: We object to the form of the question there again. There is no fifty-fifty operating agreement here in evidence. If you are going to question him about some other contract, let's get it out here, Mr. McCabe; otherwise, we will have to object to the form of the question and insist that the Court consider our stipulation with you as not in effect because you are not following it. Certainly, we are not going into the trial of this case with any sort of an understanding that we won't object to the form of the question and let you proceed in a manner that is absolutely contrary to that agreement and at the same time try to hold us to it.

Mr. McCabe: Well, the witness testified that they suggested fifty-fifty and he said he wouldn't go into that agreement.

Mr. Everett: You are asking him about a fifty-fifty agreement, but there is no such agreement in evidence.

Q. (By Mr. McCabe): Now, Mr. Jones, did you, at the time when they first approached you, or, that is, when Mr. Hurley and Mr. Gee first spoke to you about any deal concerning the Troy-Sweet Grass Syndicate leases or lands—did they have a form of agreement with them?

A. Yes, they had some blank forms, fifty-fifty. [444]

(Deposition of T. P. Jones.)

Q. And was that agreement they had commonly called, a form known as a fifty-fifty operating agreement?

Mr. Donovan: We object to this as leading; object also on the formal ground that all oral negotiations are deemed to be merged in the written contract. Prior oral negotiations and statements are entirely irrelevant and immaterial.

Mr. McCabe: Just answer the question.

(Last question read.)

Mr. Everett: We object on the further ground that the witness has not been qualified as an expert to testify as to what was the commonly known form or any other form of contract.

Q. (By Mr. McCabe): Just a moment. Mr. Jones, this first written form that they submitted to you, did they call it or designate it by any name?

Mr. Everett: I object to that, too.

A. Fifty-fifty operating agreement, they told me it was.

Mr. Donovan: That is objected to because that is leading.

Q. (By Mr. McCabe): Now, answer the question again.

A. They called it a fifty-fifty operating agreement.

Q. Who called it that? A. Mr. Hurley.

Q. At that time did you make any objection to that type of agreement? Did you state to them that you had any objection to that type of agreement?

A. I did.

(Deposition of T. P. Jones.)

Q. What did you tell them?

A. I told them that I had objected to the California a couple of days prior, and I objected to theirs. I wouldn't go into that kind of an agreement with anybody. [445]

Q. Now, when you outlined or stated to them, as you testified, the terms of the deal that you would go into with them, did you mention in describing the expenses, or did you describe the types of expenses that you would be willing for the company to pay their share of?

Mr. Donovan: This also is objected to as leading and suggestive.

Mr. Everett: Mr. McCabe, let me ask you a question now. Just what is your understanding with reference to this stipulation as to the form of questions?

Mr. McCabe: I think if it is a leading question, I think you have got to object to it. If it is not leading, your objection need not be made.

Mr. Everett: When we state an objection to the form of your question at this time, then if this deposition is permitted to be used by the Court, then the Court will then sustain our objection or strike the answer?

Mr. McCabe: Yes, as to the form.

Mr. Everett: I haven't practiced in Montana. I don't know how you gentlemen operate up there.

Mr. McCabe: Well, you better be familiar with the Montana practice.

(Deposition of T. P. Jones.)

Mr. Everett: If you are trying to put me in a hole——

Mr. McCabe: I was just going to explain it as a matter of courtesy.

Mr. Everett: I want it explained. I have got to study this deposition when I get it, and if I knew what the practice was there, I could.

Mr. Donovan: As to the form of the question, the objection must be made at the time the deposition is taken, or [446] otherwise, it is deemed waived. If it is objected to at the time of the deposition, then that objection can be urged at the trial. That is all it is meaning. All other objections can be raised for the first time at the trial.

Mr. Everett: Well, I understand that is the practice.

Mr. McCabe: Will you please read the question.

(Last question read as follows):

“Q. Now, when you outlined or stated to them, as you testified, the terms of the deal that you would go into with them, did you mention in describing the expenses, or did you describe the types of expenses that you would be willing for the company to pay their share of?”

Just answer “yes” or “no.”

A. I did.

Q. Now, what did you say?

A. I told them I would be willing to share the expense of drilling wells, putting them into production on the lease, but not a lot of outside ex-

(Deposition of T. P. Jones.)

penses all the way around the country, which Mr. Hurley said probably it wouldn't amount to much; probably ten per cent or less, maybe.

Q. And then what did you say?

A. I said, "All right, let's do this: I will give you five per cent of ours, making yours fifty-five per cent, and you pay all of the expenses outside the lease."

Q. Let me see if I understand you correctly. Did you say that your people would take forty-five per cent and you would give the company fifty-five per cent?

A. Yes, which would make it ten per cent to pay the outside expenses. Mr. Gee said he could write up a contract [447] covering that.

Q. Was there anything said at that time pertaining to the corners of the lease?

A. These expenses was to be just what was on the lease; not off the lease.

Mr. Everett: We object to that question and answer, the question as being leading, and ask that the question and answer both be stricken.

Q. (By Mr. McCabe): Now, after this conversation did Mr. Gee return to you a form of proposed operating agreement to be signed?

A. He did.

Q. And did you read it?

A. I did, and objected to it.

Q. Just a moment. You say you did. When you read it, what did you say to him?

(Deposition of T. P. Jones.)

A. I told him that the objections that I had made and wished to put in the lease wasn't in there. He said, "I will go and rewrite it and include it in there," and he did.

Q. Just a minute. After he said that he would change it and include it into the lease, did he go away, or what did he do?

A. He went away, over to his office, and was gone a while and came back with some copies rewritten, which had——

Q. Just a moment. Copies rewritten—of the proposed form of agreement? A. Yes, sir.

Mr. Everett: Let's let the witness testify. This leading business, I think we understand what it is, and it will certainly simplify it from the standpoint of this [448] witness and from the standpoint of the examination, too.

Q. (By Mr. McCabe): Did you read the last form that he returned to you?

A. I did, and he pointed out to me where it was covered; my objections were covered in it.

Q. What did he say when he pointed out that paragraph?

A. He said that covered the objections that I had; that there would be no charges against the company except what was done on their ground; the way I understood it; as he explained it to me, at least.

Q. At that time was there any agreement similar to the one concerning which you have testified made with the Potlatch Oil and Refining Company?

(Deposition of T. P. Jones.)

A. Yes.

Q. And with reference to the form of that agreement, was that similar to this agreement?

Mr. Donovan: We object to this.

Mr. McCabe: All right. I withdraw it.

Q. When Mr. Gee made this statement concerning this portion that he had included in the proposed form of operating agreement, was Mr. Hurley present? A. Yes, sir.

Q. And after he made that statement, what did you do with reference to the original operating agreement of which Plaintiffs' Exhibit 2 purports to be a copy? A. What did we do?

Q. What did you do?

A. We signed it up.

Q. You signed it, and who else signed it?

A. Mr. Luke signed it and the Ohio men [449] signed it.

Q. And by "the Ohio men," who do you mean?

A. Why, Hurley and Sellery. I don't know whether Gee signed it. I don't think Gee signed it, as I remember.

Q. Were you acquainted with Robert E. Wilson?

A. Yes, sir.

Q. And were you acquainted with him in the year 1922? A. I had been for several years.

Q. Did you ever hear of the Inland Empire Oil & Gas Syndicate? A. I did.

Q. Did you ever sign an instrument designated "Agreement and Declaration of Trust of Inland Empire Oil and Gas Syndicate"? A. I did.

(Deposition of T. P. Jones.)

Q. Did anyone else sign that?

Mr. Everett: We object to the form of the question. Mr. McCabe, if you want to introduce it—First, I think that is the best evidence of it.

Mr. McCabe: I have got to show the execution of the original before I can introduce a certified copy. That is the idea. In other words, that is my foundation question for the introduction of the certified copy.

Q. Did anybody else sign the same instrument?

A. Mr. Wilson and Mr. Gerlough.

Q. Showing you an instrument marked for identification Plaintiffs' Exhibit 1, please examine that instrument.

A. Well, I will frankly say that I cannot read this here. I ain't as good sight as I once was, but I can see the names and so on. If you want me to take the time, I have a glass here that probably I can read it with. I have a stronger one [450] at home. Maybe I can read it.

Q. Well, just look at this Plaintiffs' Exhibit 1.

A. Do you want me to read this over?

Q. Just kind of glance through it. Did I show you before coming up to this hearing this morning, or up to the Court House, an exhibit marked Plaintiffs' Exhibit 1? A. Well, I think you did.

Q. Well, examine it and see whether I did or not.

A. I don't remember whether you did or not. You showed me something. I am not going to read all of this.

(Deposition of T. P. Jones.)

Mr. McCabe: We will dispense with it. We will introduce it in another way.

A. Lots of words I can't make out, but I know the instruments were made.

Q. Well, were you ever connected with the Inland Empire Oil and Gas Syndicate?

A. I was a director in it, or trustee, as you may call it; trustee of the syndicate.

Q. Do you know who else were trustees with you at any time?

A. Jean Gerlough and R. E. Wilson.

Mr. Everett: We object to the form of the question until you bring out the times he was connected with it.

Q. (By Mr. McCabe): What years were you connected with Troy-Sweet Grass Oil and Gas Syndicate; between what years or during what years?

A. Well, 1922 and '23, until it was dissolved. I don't remember what year the company was dissolved, but it sold the holdings to the Potlatch.

Q. During that time, who else, if anyone, were trustees [451] with you of Troy-Sweet Grass Oil Syndicate?

A. There were K. G. Luke, J. A. Harsh and Stapleton. I forget Mr. Stapleton's initials.

Q. And Mr. Stapleton?

A. I don't remember his initials now. I know him well, for years and years; worked with him for a number of years.

Mr. Everett: That is the Troy-Sweet Grass you are talking about? A. Yes.

(Deposition of T. P. Jones.)

Q. (By Mr. McCabe): Did all of those men hold office at the one time or different times?

A. No. Stapleton and Luke, I think, and myself first. Then I don't just remember who else was in at first. They had that organized before I got into it. I came into it after I bought into it, and took command of it. I don't just remember who all the fellows were who was in it at that time.

Q. Were there more than three trustees at the time, or just what is the fact?

A. There was three or five. I think the articles provided for three or five, or three or seven. I wouldn't be sure to remember now. That is a long time ago.

Q. When you were connected with the Troy-Sweet Grass Oil Syndicate, did you have any official title?

A. I was president of it and manager.

Q. President and manager? A. Yes.

Q. Now, during any time during the years 1922 to 1927, were you acquainted with Mr. John McFadyen, who purported to——

A. Yes.

Mr. Everett: Let's not lead. [452]

A. I got acquainted with him.

Q. (By Mr. McCabe): And what other name was he known by?

A. Why, I never heard of any names than John McFadyen or Jack.

Q. Jack McFadyen?

A. Yes. That is all the names I ever heard of him. It was sometime after we got operating in the Kevin field that I got acquainted with him.

(Deposition of T. P. Jones.)

Q. At the time you knew him, was he acting or purporting to act—— A. Yes, sir.

Mr. Everett: You haven't shown any time yet, Mr. McCabe.

Mr. McCabe: Yes. Anytime between 1922 and 1927.

Mr. Everett: He said he didn't become acquainted with him until after they were operating.

A. Well, we started operating in '22, and it may have been '23 or '24 that Jack came up to the field first, and I got acquainted. I wouldn't say what year it was. It was a year or so after we started operating that I got acquainted with Jack. I guess he had been in the field.

Mr. McCabe: Did you know L. J. Yealy?

A. I did.

Q. When did you first get acquainted with him?

A. I couldn't say exactly. Probably the first year he became active in the field.

Q. And about when would you say?

A. I think probably it was '24, maybe late '23, when he first came into the field. I wouldn't swear when he first came in the field; maybe '23 [453] or '24.

Q. After the instrument designated "Operating Agreement," a copy of which has been introduced as Plaintiffs' Exhibit 2, was signed, what, if anything, did the Ohio Oil Company do in connection with the property described in the agreement?

A. Well, they started drilling.

Q. And who took possession of the property?

(Deposition of T. P. Jones.)

A. The Ohio Oil Company.

Q. Did the Troy-Sweet Grass or any of its officers or agents have anything to do with the active operations on the land?

A. Nothing at all. The contract provided the Ohio should do that.

Q. Do you remember when the Ohio drilled the first well under the agreement?

A. I wouldn't describe the land. It was what is known as the Baker lease in three or four of that township, Section 3 or 4 of that township. I wouldn't positively say.

Q. Do you know who took the oil that was produced? A. The Ohio Oil Company.

Q. And did the Ohio drill one or more wells upon the land described in the operation agreement?

A. I think they drilled a number of wells, eight or nine, and maybe have drilled more since. I don't know.

Q. Did they produce any oil or gas or both?

A. They produced oil in the first well, and all of them that they drilled under that particular lease produced oil.

Q. Do you know about the time, the approximate time that they completed the drilling of the well which you say was drilled on the Baker lease?

A. Well, I wouldn't exactly say the date that it was [454] drilled in. It wasn't very long, because I had a standard rig erected on the lease. I sold them the rig. I was going to drill it myself; was

(Deposition of T. P. Jones.)

just ready to drill in when I made a deal with Mr. McFadyen and sold him my rig. He started drilling a few days afterward. I don't know how many days; not very many, but I came over home because I had business over here, and the first thing I heard, the well was in. I wouldn't remember what date.

Q. Let me ask, was it sometime in 1922?

A. Oh, yes; late June or first of July, something like that.

Mr. Donovan: Then I think I must have misunderstood something here.

A. I say, it may have been late June or the first of July that it came in.

Mr. Donovan: I understood you to say that you sold the rig to McFadyen?

A. I sold the rig, not to McFadyen, but to Hurley, I said.

Mr. Donovan: I thought you said McFadyen.

A. No. I sold it to Hurley, right the day I made this agreement with them. I sold them the rig that I was erecting on the lease.

Q. (By Mr. McCabe): A moment ago you used the name McFadyen. Was it McFadyen you sold the rig to, or Mr. Hurley?

A. No. Mr. Hurley. I didn't know McFadyen then. I meant Mr. Hurley. I sold it to him the very day I made the contract, after we had signed it.

Q. After the Ohio Oil Company discovered oil on the Baker lease and continued their operations, as you have [455] testified, did they submit to you

(Deposition of T. P. Jones.)

at any time, or the Troy-Sweet Grass Oil Syndicate, any writing setting forth items of expense which they claimed had been incurred in connection with their operation?

A. They did. They started in right away.

Q. How often were those statements submitted?

A. Supposed to be submitted every month.

Mr. Everett: I object to the form of the question in the absence of any such statement in the record.

A. They were supposed to be submitted every month that oil was sold.

Q. (By Mr. McCabe): On these statements—Did you read the statements?

A. Why, yes, I read them.

Q. At any time did you discuss any of the items appearing on these statements with any person connected with the Ohio Oil Company?

Mr. Everett: Let's have the time and persons, the names of the persons.

Mr. McCabe: In the year 1922.

A. Why, I wouldn't say whether it was Yealy or Hungerford. There was a man named Hungerford that had something to do with the Ohio out there at one time in the operation, and I wouldn't say whether it was Yealy or Hungerford, but anyway, I said they were charging us for stuff they hadn't ought to charge us. Anyway, they said to take it up with the officials of the company.

Q. (By Mr. McCabe): Directing your attention to the year 1925, did you retain, or did Troy-Sweet

(Deposition of T. P. Jones.)

Grass Oil Syndicate retain any attorneys to act for them? [456]

A. Why, when they kept charging us with stuff——

Q. Just say “yes” or “no.” A. Yes, sir.

Q. And what firm of attorneys did they retain?

A. We retained Freeman, Thelen & Frary of Great Falls, Montana.

Q. And in the year of 1925, was there any meeting held in Shelby, Montana, at which were present Mr. Firmin, purporting to act for the Ohio Oil Company, Mr. Jean Gerlough, Mr. J. W. Freeman, Mr. R. E. Wilson and yourself?

A. Yes, we had a meeting there.

Mr. Everett: May it be understood, Mr. McCabe, that my previous objection there as to competency applies to this, as to Mr. Firmin also, who is also deceased?

Mr. McCabe: Yes.

Q. And in a general way, what was discussed, or was there any discussion at that meeting concerning the operation of the Ohio Oil Company under the operating agreement? A. Yes.

Mr. Everett: May I examine the witness a moment on voir dire?

Mr. McCabe: Yes, go ahead.

Q. (By Mr. Everett): Did you make records of your meetings? Did you keep minutes of your meetings?

A. I think we did in our minute books. Well, no. It wasn't a company meeting. It was an official

(Deposition of T. P. Jones.)

meeting with the Ohio and the two different companies.

Q. (By Mr. McCabe): But on this occasion that I refer to——

A. With the attorneys we had employed to defend us, or collect what we had been [457] overcharged.

Q. Possibly I confused you. What I intended to ask you is, were you present in Shelby, Montana, in the year 1925, in company with Mr. Freeman, Mr. J. W. Freeman, Mr. Jean Gerlough and Mr. R. E. Wilson? A. I was.

Q. During that time when you were present with those persons, was there any discussion had between you or the persons present concerning the operations of the Ohio Oil Company under the operating agreement? A. Yes.

Q. And at that meeting, that discussion, what in a general way did that discussion refer to?

A. Overcharges that the Ohio had made against us.

Mr. Everett: We object to this line of questioning for the reason previously stated, and the further objection that in the answer to my question he stated that they kept minutes of their meetings, so I make this further objection, that if there was any official action taken, the best evidence is the minutes of the corporation.

Q. (By Mr. McCabe): Was this a meeting of the company, or just individuals?

A. No, just a meeting of the directors of the

(Deposition of T. P. Jones.)

various companies and the Ohio representative and our attorney to try to clear up or clarify the thing.

Q. At that meeting did Mr. Firmin make any request to the persons present relative to the operations or concerning the operations of the Ohio?

A. Yes, he did.

Q. What did he say?

A. Why, he requested a written statement of our [458] objections and so on, and if I remember right, we sent it to him.

Q. Now, just a minute. After he made this request, did you give Mr. J. W. Freeman any instructions concerning these operations?

A. Yes. Mr. Freeman was our attorney, and we gave him instructions to furnish what he requested.

Q. What did you ask Mr. Freeman, as one of your attorneys, to do?

Mr. Everett: Which Mr. Freeman is that?

Mr. McCabe: Mr. J. W. Freeman.

Q. What did you ask him to do, you or Mr. Gerlough, or Mr. Wilson, or any of you?

A. Well, we directed him to collect this money, if I remember right; the overcharge.

Q. Were there any directions given him with reference to writing Mr. Firmin this letter that was requested?

A. Oh, yes; we told him to write him.

Mr. Everett: I object to that as leading.

A. To give him what he asked for and to collect the money for us.

Q. (By Mr. McCabe): After that meeting did

(Deposition of T. P. Jones.)

Mr. Freeman make any statement to you and the persons that were present at that meeting, other than Mr. Firmin, concerning whether he had written a letter? A. He did.

Mr. Donovan: I object to that as hearsay.

Mr. Everett: I want to make the further objection, too, that Mr. Firmin is dead and we would have no opportunity to cross-examine him, and that is one of the things that the [459] parole evidence rule is supposed to protect against, and I think that again, anything as to conversations and so on with Freeman is objected to.

Mr. McCabe: I will tell you, frankly, we intend to bring all of this within the exceptions to that rule that you stated.

Q. Now, Mr. Jones, after the meeting, did you ever receive a letter purporting to be a copy of the letter which Mr. Freeman said he had written to Mr. Firmin?

A. Yes, sir. It was put in our records. It was put in our files.

Q. Showing you this letter marked Plaintiffs' Exhibit 26 for identification——

A. Yes, that is some correspondence we had received from Mr. Freeman.

Q. Are you able to identify that letter? Do you recognize it? A. I do.

Q. Did you show this letter to Mr. Gerlough or Mr. Wilson, or both of them, after you received it?

Mr. Everett: I object to the question as being leading.

(Deposition of T. P. Jones.)

Mr. McCabe: Strike it.

Q. Did you show this Plaintiffs' Exhibit 26 to anyone else, any other person, after you received it?

A. Why, yes, sir; I showed it to——

Q. Who did you show it to?

A. I showed it to Mr. Gerlough and Mr. Wilson, and I think Mr. Harsh, and probably Mr. Hornby. I don't know who all; probably the directors of the various companies.

Mr. McCabe: I now offer Plaintiffs' [460] Exhibit 26.

A. I was trying to think of another man's name as director of the Inland of Seattle. I can't speak his name right now. I knew him well, too. Mr. Ball, I think.

(Whereupon, copy of a letter marked Plaintiffs' Exhibit No. 26 was received in evidence and is hereto attached and made a part hereof.)

Q. (By Mr. McCabe): Did you ~~you~~ receive a letter from Mr. J. W. Freeman of the firm of Freeman, Thelen & Frary, purporting to be a copy of a letter from the Ohio Oil Company in response to the original of Plaintiffs' Exhibit 26? A. Yes.

Mr. Donovan: That is objected to as leading, and it also calls for hearsay.

Mr. McCabe: Just answer the question.

A. I did, yes.

Q. Showing you Plaintiffs' proposed exhibit marked "Plfs. Ex. 27," I will ask you to state whether you recognize that exhibit or able to identify it? Just answer "yes" or "no."

(Deposition of T. P. Jones.)

A. The question was, did I receive this?

Q. Yes. Do you recognize it, or can you tell what it is? A. Why, it is a letter that——

Q. Just say “yes” or “no.” A. Yes.

Q. Just state what that exhibit is as to being a copy, or otherwise, of the letter which Mr. Freeman notified you he had received from Mr. Firmin.

Mr. Donovan: I object to this as hearsay, also leading, and the witness stating whether he has any personal knowledge of it whatsoever. [461]

Q. (By Mr. McCabe): Do you know what the question is? Just read the question.

(Last question read.)

A. I remember having received a copy of this, or a copy just like it.

Q. Did you receive this from Freeman, Thelen & Frary?

Mr. Donovan: Objected to as leading.

Q. (By Mr. McCabe): Who did you receive it from? A. Mr. Freeman.

Q. By “Mr. Freeman,” what Mr. Freeman?

A. Well, J. W. Freeman. Judge Freeman, we used to call him.

Mr. Everett: We understand we have our objections, all objections we might have?

Mr. McCabe: Yes.

Q. In the year of 1926, were you present at a stockholders’ meeting of the stockholders of Potlatch Oil and Refining Company? A. Yes.

(Deposition of T. P. Jones.)

Q. What time of the year was that held, the first or last, or what part of the year, do you recall?

A. Well, we used to postpone the meeting, you know; call a meeting at the regular time and then postpone it. I don't just remember positively what date the meeting was held.

Q. Well, at this meeting Mr. Freeman and an attorney, or a man purporting to be an attorney, from Tacoma, spoke to the stockholders?

A. Yes, sir.

Mr. Everett: We object to the question as leading.

Mr. McCabe: That is merely to identify the meeting.

A. Yes, they talked to the stockholders. [462]

Q. (By Mr. McCabe): And after that meeting did you see Mr. John McFadyen?

A. Yes, several times.

Q. And did you have any conversation with him pertaining to the operating agreement between the Ohio Oil Company and the Troy-Sweet Grass Oil Syndicate?

A. Yes, sir.

Mr. Everett: We object to the question as being leading.

Mr. McCabe: At the time and place—Where was it you saw him?

A. At Shelby, Montana.

Q. And where and what place in Shelby, Montana, do you remember?

A. Why, I think it was right across from the hotel there, the oil station. I saw him and I went over and talked with him.

(Deposition of T. P. Jones.)

Q. And what hotel was that?

A. That Rainbow Hotel. There was a filling station just across the street there, and I seen John and I went over and talked to him.

Q. Who was present at that time?

A. When I was talking to Mr. McFadyen?

Q. Yes.

A. Myself and John McFadyen.

Q. And was there any other person present?

A. No, because he was just going to leave the country, and I wanted to talk to him before he left.

Q. What did you say to him at that time in connection with this operation?

A. I told him if he didn't correct these things and make [463] an accounting, we would have to enter a suit against the Ohio Oil Company.

Q. And what did he say?

A. He told me—He said, "Don't start no suit, because the Ohio Oil Company is responsible and reliable, and eventually in the final account we will fix this thing up and pay you anything that was overcharged against you. You can rest assured of that. The Ohio Oil Company is responsible and reliable." He said, "I will use my efforts to see that it is brought to a head without a suit."

Q. As a result of Mr. Fadyen's statement to you, what if anything did you do with respect to starting a suit? A. I didn't start any at all.

Q. What is that?

A. I didn't pretend to start any. I told my

(Deposition of T. P. Jones.)

directors just what he said, and I said, "We will wait and see."

Q. After you had this conversation, did you notify any person connected with either the Troy-Sweet Oil Syndicate or the Potlatch Oil Company, or both of them, concerning this conversation you had with Mr. McFadyen?

A. I did. I talked, I think, with Mr. Gerlough and Mr. Wilson and Mr. Harsh, and I think to Mr. Ball and Mr. Laird. I don't know how many I talked to about it.

Q. Who are you positive that you did talk to?

A. I know I talked to them because they were our directors of my different companies.

Q. Are you positive that you talked to all of them, or just some part of them?

A. I didn't see them all together, but I talked to Mr. Harsh, over there and over here. We were in the bank [464] together, and I was with Mr. Laird here, and the others were over there, except Mr. Ball, and he was in Tacoma.

Q. In the years 1922 and subsequent years, did you hold any position with any other company? Were you working for any other company besides Troy-Sweet Grass and Potlatch?

A. Yes, I was, all the time working for other companies, too.

Q. Who were you working for besides those companies? A. Potlatch Lumber Company.

Q. As a result of this other work that you did, did it take you away from Shelby, Montana?

(Deposition of T. P. Jones.)

A. Oh, yes. I was only there part of the time. I left a secretary there always.

Q. And what was your practice in regard to spending time in Shelby in connection with the affairs of the Troy-Sweet Grass Oil Syndicate and Potlatch Oil and Refining Company?

A. I was there a good part of the time; after '23 more than before that. Sometimes I was east; sometimes I was one place and sometimes another, but I tried to take care of the business affairs the best I could.

Q. Did you go back and forth between Shelby, Montana, and the other places you worked during that time?

A. Yes, all the time going back and forth.

Q. Did you ever sever your connections with the Potlatch Oil and Refining Company and Troy-Sweet Grass Oil Syndicate as trustee or officer?

A. I did, in '32.

Q. About 1932?

A. The spring of '32, yes, sir. I wasn't around Shelby much, a great deal, so I severed my [465] relations.

Q. Showing you Plaintiffs' Exhibit 28 for identification, I will ask you if you ever received that from any source? A. Yes, sir.

Q. You received that? A. Yes, sir.

Q. In the United States mail?

A. Yes, sir.

Mr. McCabe: We now offer in evidence Plaintiffs' purported Exhibit 28.

(Deposition of T. P. Jones.)

(Whereupon, a letter marked Plaintiffs' Exhibit No. 28 for identification was received in evidence and is hereto attached and made a part hereof.)

Q. (By Mr. McCabe): Now, have you read that exhibit?

A. Yes, sir, I have read that time and time again.

Q. Do you recall the letter referred to in that exhibit to which the exhibit purports to be an answer?

A. Do I do what?

Q. Do you recall, or have you any recollection concerning the letter to which this was the answer?

A. I have, yes. I have some recollection.

Q. Showing you Plaintiffs' Exhibit 29, please read and state whether you can identify that carbon copy of a writing?

A. Yes, that is a letter I sent them.

Q. Who wrote that letter, the original of which this purports to be a carbon copy?

A. I think I wrote it myself, personally.

Q. That is your recollection?

A. Yes, sir.

Q. And did you mail that in the United States mail? [466]

A. Yes, sir. I think I wrote it personally myself. The secretary was over here.

Mr. McCabe: I now offer in evidence Plaintiffs' Exhibit No. 29.

(Whereupon, a letter marked Plaintiffs' Exhibit No. 29 for identification was received in evidence and is hereto attached and made a part hereof.)

(Deposition of T. P. Jones.)

Q. (By Mr. McCabe): Did you have correspondence or write letters to the Ohio Oil Company or receive letters from the Ohio Oil Company while you were connected with Troy-Sweet Grass Oil Syndicate or Potlatch Oil and Refining Company?

A. Did I have letters?

Q. Did you receive letters? A. Yes, sir.

Q. Did you write letters to those people?

A. Yes, sir.

Q. And after you severed your connection with the Troy-Sweet Grass Oil Syndicate and Potlatch Oil and Refining Company, what did you do with those letters and copies of letters?

A. I left them in the file over in the Potlatch Oil and Refining Company?

Q. Where? A. At Shelby, Montana.

Q. Do you have any letters in your possession or copies of letters written to you by the Ohio, or written on behalf of the Troy-Sweet Grass Oil Syndicate or Potlatch Oil Company to the Ohio Oil Company?

A. I left all letters and copies of letters in the files over in Shelby, Montana. I took none [467] away.

Q. As far as you know, they are still there?

A. As far as I know, they are still there. I haven't examined them or been there for sometime.

Q. In your testimony this morning you mentioned Mr. Gee bringing back to you on June 15, 1922, a proposed form of operating agreement in which the interests specified were fifty-five per cent

(Deposition of T. P. Jones.)

interest to the Ohio Oil Company and forty-five per cent interest to the Troy-Sweet Grass Oil Syndicate, which you didn't sign. Do you recall that testimony? A. Yes, sir.

Q. Did Mr. Gee leave that form with you or a copy of it at that time.

A. No, he took them back.

Q. What did he do with it?

A. I don't know. He took them right back to his room where he wrote them and rewrote copies and brought them back and including the clause that I wanted in it, as I understood.

Q. Did you ever hear of Potlatch Oil and Refining Company? A. Yes, sir.

Q. Were you ever connected with that company?

A. Yes, sir.

Q. What was your connection?

A. I was a director and president of it.

Q. During what years?

A. From the day it was created until 1932.

Q. And do you remember about the year it was created or organized?

A. The spring of '22, March or sometime in the spring of [468] '22, '21 or '22. It might have been late '21, but I think it was the spring of '22.

Q. In other words, were you connected with it from its inception as a corporation?

A. Yes, sir. I was the instigator of it. I was the instigator of it.

Q. Did you have any other capacity, manage-

(Deposition of T. P. Jones.)

rial capacity with the Potlatch Oil and Refining Company?

A. I was manager—president and manager.

Q. And a director? A. And a director.

Mr. McCabe: That is all, Mr. Jones.

Cross-Examination

By Mr. Everett:

Q. What stock do you own in the Potlatch Oil and Refining Company?

A. I own 1400 shares right now.

Q. How many shares of stock are there outstanding?

A. There is 1463 or 1465 thousand.

Q. How many shares did you initially own?

A. I think about 150.

Q. And what was the authorized capital stock at that time?

A. Two thousand shares, or two million shares.

Q. How much of that was outstanding?

A. Well, this 1400 and some—1460; I wouldn't say whether it was 1463 or close to 1465.

Q. That was in 1922?

A. '23 was the last that was issued, I believe, or '24. [469]

Q. In '24 was the last stock that was issued?

A. '23 or '24 was the last stock that was issued.

Q. And how much stock was issued to you during the years 1922, '23 and '24?

A. Well, whatever I had. It was one hundred forty and some odd thousand all together.

(Deposition of T. P. Jones.)

Q. One hundred forty and some odd thousand?

A. I think it was 140,000; between 140,000 and 150,000.

Q. And at the time the 140,000 or 150,000 was issued, how much—what was the total outstanding stock at the time you held 140,000 or 150,000 shares?

A. Well, it was 1465 thousand, I think; 1465 thousand, if I remember correct. I don't remember the exact thousand.

Q. Put it this way: What percentage of the authorized and outstanding stock did you hold at the time you were president and manager of the company?

A. Well, I told you—a hundred and forty some odd thousand.

Q. Out of the total amount issued?

A. Out of the total amount issued.

Q. Well, what was the total amount issued?

A. Fourteen hundred sixty-five thousand shares, and I had 140 something of it.

Q. You had 140-some thousand? So that that would leave how much stock outstanding, issued and outstanding to others, that you didn't own?

A. The balance of 1465 thousand with mine subtracted.

Q. That would be 140,000 from 1465 thousand?

A. Yes.

Q. You held, then, in percentage about ten per cent of [470] the stock?

A. If that figures ten per cent, that is what I held.

(Deposition of T. P. Jones.)

Q. I don't know. I don't get your 1465 thousand.

A. There was 1465 thousand shares of stock out, and I owned 140 some odd thousand shares.

Q. When you say 1465 thousand, you mean 1,465,000? A. Yes, sir.

Q. And how much of that outstanding stock did your wife own?

A. I think she—I couldn't tell you exactly, because she bought some stock one time and paid two dollars a share for it when she hadn't ought to. She bought some other people's stock.

Q. Well, what was the stock that you gave her? How much did you give her of this 1,465,000?

A. I never gave her any except what she paid for.

Q. And how much stock did she hold? You don't recall?

A. Yes. I don't recall exactly what she has now. She did have—she don't tell me all she has got. She has got a lot of stuff she don't tell me about. I know she bought some and paid two dollars a share for that I objected to when I found out, but she has probably over 100,000 shares now.

Q. She has 100,000 shares now? A. Yes.

Q. And what is the outstanding stock now?

A. The same as it was.

Q. One million, four hundred sixty-five thousand?

A. I haven't been in the company for quite a

(Deposition of T. P. Jones.)

while. I don't know. I don't know what they would issue any for. I issued all of the stock that was supposed to be issued. [471]

Q. Have you received any stock dividends recently? A. Not for a year.

Q. I am speaking of stock dividends.

A. Oh, no. We only received stock dividends once.

Q. What was the once you received stock dividends?

A. Let me see. I think it was 1924.

Q. Well, do you recall what that dividend was, how much stock you received as a dividend?

A. Well, I will tell you frankly. I will be truthful and tell you. I declared a stock dividend twelve and one-half to one that was outstanding. That is how this stock came out.

Q. Twelve and one-half to one?

A. Yes, sir.

Q. And what about cash dividends?

A. Well, I think there is seven or eight dividends has been paid. I ain't sure what it is. Since I quit the company, my stock wasn't so much that I didn't pay much attention to it, but I think they have declared seven or eight dividends; ten, something like that.

Q. Since 1932.

A. Since it was organized.

Q. Well, did you have any cash dividends during the time that you were president of the Potlatch?

(Deposition of T. P. Jones.)

A. Yes, two or three or four. I don't remember which it was.

Q. You were receiving a salary at that time from the Potlatch?

A. Yes. I was receiving a salary, when I was president of that. [472]

Q. When you were president, what was the source of income of the Potlatch Company?

A. Well, it had money from the Ohio, and I think I drilled fifteen wells out there in the field. I think I had ten little wells; fifteen for the Potlatch; ten or twelve. I don't remember now just how many.

Q. Most of your income was from what source?

A. Most of it was from the Baker lease; the biggest part of it for a few years there, and then they dropped off.

Q. That is when the production dropped?

A. As the production went down, they dropped down, of course.

Q. Do you still have your interest in the Inland Empire?

A. No. I have got fifty shares. I sold the rest of it.

Q. You still have fifty shares of Inland Empire?

A. I have fifty shares of Inland Empire; fifty dollars invested in the Inland Empire, and I didn't know that or I would have sold that, too.

Q. When did you dispose of your interest in the Inland Empire?

(Deposition of T. P. Jones.)

A. Oh, it was '31—'30 and '31, I think most of it; a little of it in '32, the spring of '32. I wanted money in other business and I sold it.

Q. Did you receive each month from the Ohio Oil Company during the time you were president a statement of account? A. Yes, sir.

Q. And if there was any credit balance due the Potlatch Oil and Refining Company on those accounts, did you receive the checks to cover [473] that? A. Yes.

Q. You endorsed those checks——

A. The Potlatch received it.

Q. And what about the Inland Empire?

A. Well, they received theirs, too.

Q. During that time, from your Inland Empire interests, did you have any income from that interest?

A. I had a little. I don't just remember what it was, because I was selling off Inland Empire stock. I sold the most of it. I just kept enough so I could be a director until '32, then I disposed of that.

Q. But The Ohio Oil Company did send you a monthly statement?

A. They sent the Inland Empire and the Potlatch.

Q. Sent them both a monthly statement?

A. Yes, sir.

Q. And the Troy-Sweet Grass prior to the time——

A. It was dissolved.

Q. Prior to the time it was dissolved?

(Deposition of T. P. Jones.)

A. Yes, sir.

Q. When those statements and checks were received, did you cash the checks?

A. I think I did two or three times. Most of the time they were put right into the bank to the credit of the Potlatch.

Q. Well, the checks were deposited for the credit of the Potlatch Oil and Refining Company?

A. Yes.

Q. What about the Inland Empire?

A. The same way. I wasn't running the Inland Empire. [474] I was a director, but I wasn't running that. Mr. Gerlough was a director, Mr. Wilson, and then Mr. Gerlough, but I got my statement from him.

Q. Potlatch retained the monies in its account that it received from the Ohio?

A. Yes, sir.

Q. Were you a director or trustee or beneficial interest owner in the Troy-Sweet Grass Oil Syndicate in September of 1922?

A. Yes.

Q. Did you receive a statement from the Ohio Oil Company—did the Troy-Sweet Grass receive a statement from the Ohio covering the Month of September, 1922?

A. I suppose they received one every month. They were supposed to receive one every month. I can't remember what the book says now, but they were supposed to get one. I believe there was one or two months we didn't receive it and we wrote them about it, or something like that.

(Deposition of T. P. Jones.)

Q. I have a copy of the Ohio Oil Company statement of September 30, 1922, being Bill No. 2092, addressed to the Troy-Sweet Grass Oil Syndicate. In that I note the items as follows, the following items: Cost of wells, \$1,098.92; gas expense, \$36.73, or a total of \$1,135.65; ten per cent of above, over-head expense, \$113.56; net cash advanced during September, 1922, \$1,249.21; net cash advanced to September 1, 1922, \$189.93; net cash advanced October 1, 1922, \$1,439.14; interest on net cash advanced to September 1, 1922, \$189.93, for one month at eight per cent, \$1.26; showing a net cash advance and interest chargeable to the account of the Troy-Sweet Grass Oil Syndicate in the total amount of \$1,440.40. [475] Did you object to any of the items listed in that account at that time?

A. Well, I can't remember what objections I made at that time. That was in '22?

Q. 1922.

A. What well was that, and what well were they drilling? There were two or three pieces of ground they were drilling wells on and they sent accounts for it, and on some we owed them \$38,000 to \$40,000.

Q. Your testimony is, you can't remember whether you objected or whether you didn't?

A. I don't suppose I did. If you identify the record of it. What well is that you are talking about that they drilled?

Q. Well, I am asking the questions here. I am not testifying. Well, for example, here is a state-

(Deposition of T. P. Jones.)

ment of January 21, 1923, addressed to the Troy-Sweet Grass Oil Syndicate at Shelby, Montana, Bill No. W-2369—

A. What lease is that on?

Q. On the Irving H. Baker, well 1, the Irving H. Baker Well 3, and the water well one, I believe it is, and this totals—I can give you the details if you want it.

A. No, I don't want it.

Q. The total is, cost of wells, \$3,826.55; cost of service equipment, \$1,086.22; oil expense, \$31.66; gas expense, \$47.89; making a total of \$4,992.32; plus ten per cent of that amount, \$499.23; with a credit of \$661.50 for miscellaneous earnings; net cash advances during January 1923, \$4,830.05; net cash advanced to January 1, 1923, \$5,511.28; net cash advanced to February 1, 1923, \$10,341.33; interest on [476] net cash advanced to December 1, 1922, \$45.58; interest on net cash advanced to January 1, 1923, \$5,511.28, for one month at eight per cent, \$36.74; making the net cash advances and interest and showing a debit balance in the amount of \$10,423.65. Did you object to that statement?

A. I objected several times to the—

Q. Well, to this particular statement?

A. Well, I don't know that particular statement or not, but I did several times to the different statements as they came in. I objected to the account to the men out in the field there, and they

(Deposition of T. P. Jones.)

told me to take it up with the company, which I did.

Q. Have you introduced in evidence all of the communications that you have had from the company complaining about these various items?

A. I couldn't say. I just don't know.

Mr. McCabe: I have introduced some of the communications that have been delivered to me, but whether they were all that were made to the company, I couldn't say.

Q. (By Mr. Everett): Let me ask the witness if he recalls, were there any more letters or communications that you addressed to the company, other than those that Mr. McCabe showed you this morning?

A. The records are all over there. If there were they must have them.

Q. Were there any more than were exhibited to you this morning?

A. Well, I don't know. There may have been. It is a long time since '32, when I turned the files over. There may be some more. [477]

Q. Let me say this was in 1923 I was just reading about, and you don't remember whether you made any complaints about these items or not, to the headings in there?

A. I don't remember that particular month, but I made several complaints to the officials of the company. I don't know about that particular month.

Q. Well, is there any particular month that you would remember?

(Deposition of T. P. Jones.)

A. No, there wouldn't be any particular month that I would, because I was complaining to the bookkeepers and different ones pretty near eternally, but they said there was no use complaining to them; I could take it up with the company, which we did, or had our attorneys do it. I don't know whether it was Yealy or Hungerford.

Q. Well, on that one balance here to Sweet Grass of \$10,000—on that statement of January 21, 1923, it showed a debit balance to the Ohio Oil Company of \$10,423.65. Were you called upon to pay that in cash?

A. No. We weren't to pay nothing in cash. They were to take it out of production, interest and all.

Q. Well, they did take it out of production?

A. Well, I think they did.

Q. You subsequently received some checks?

A. Yes, sir.

Q. But you received no check if there was a debit balance?

A. No. We received no check when there was a debit balance. I think Mr. Findley, the auditor in Great Falls, several times talked about the items that was overcharged and tried to arrange, and I so notified the company of the charges [478] all the time.

Q. Did the company, as to incorrect charges—did they ever during the time you were president make any adjustment? A. No, sir.

Q. What about this letter that you had here?

(Deposition of T. P. Jones.)

Did you receive a letter from Mr. Billstone when you called his attention to the fact that a check did not accompany the statement?

A. His letter explained that. The check came along but they charged that much work up illegally, too, and kept it.

Q. That was your contention?

A. Yes, sir, that was my contention.

Q. And in answer to your contention, what did they state—that the charge was legal, or what was their position?

A. Well, they explained why the check didn't come, and they said it was \$9,000 and something chargeable to us for the water system, which I didn't figure was supposed to be included.

Q. Are you familiar with operations out there in the field?

A. I was familiar up to that time, '32.

Q. Well, did they need water to produce the Baker lease?

A. Most assuredly they did need water and had to have it.

Q. Then why was it you contended the charge wasn't proper?

A. Because it was outside, and I gave them five per cent of that to pay for those things, their five and my five.

Q. That is a difference of opinion.

A. That is a difference of opinion now. It wasn't a difference of opinion when we made the contract. [479].

(Deposition of T. P. Jones.)

Q. Then, what was this charge in September, 1923, where they charged you for those things?

A. That is what I wanted to find out why they charged us. I am trying to find out. I ain't trying to find out now so much as the fellows that own it, but I would like to have them find out why they did charge the stockholders.

Q. The charges were made. This \$10,000?

A. There were a lot of them made.

Q. The \$10,000 debit, that was paid by Sweet Grass, was it?

A. No. The Ohio paid themselves. They took it out of production.

Q. Did they give Sweet Grass the balance when there were no debits? A. Yes.

Q. And the statements, they were sufficiently itemized so that you knew exactly what items were being charged?

A. Yes. I knew what items were being charged.

Q. And it was your contention that some of those items were not properly chargeable?

A. Absolutely.

Q. And it was their position that the items were properly chargeable?

A. They had it in their own hands. They charged them, anyhow. They were operating the lease.

Q. You testified you knew Mr. Yealy?

A. Yes, I knew Mr. Yealy.

Q. Did he do any work on the Baker lease?

A. Why, he was field manager. He did it on all of them.

(Deposition of T. P. Jones.)

Q. I mean, did he work on the Baker lease as well as [480] well as some of the others?

A. I suppose some of his time, apparently, was charged against it. I don't suppose he did any real work on the lease, no.

Q. He supervised all of the operation, did he?

A. He supervised the whole field.

Q. Well, would the field operate without supervision?

A. I don't suppose it would. I wouldn't think that it would.

Q. Did you object to the charge for part of his time? A. Absolutely, I did.

Q. Even though you knew that supervision was necessary in the field?

A. Absolutely, because I gave them five per cent of production to help pay for supervision and accounting and everything else. I voluntarily gave them five per cent of production to help pay for those things.

Q. A share of his labor was billed to you, though, in 1923, and at all times since?

A. Yes, as far as I know.

Q. And he supervised the Baker lease as well as the others?

A. I suppose he did. He was supervising the field. That is what he was supposed to have come there for, as I understood it.

Q. Were the expenses of operation supposed to be paid by Potlatch or Troy Sweet Grass or Inland Empire?

(Deposition of T. P. Jones.)

A. Expenses on the lease were supposed to be paid, for the drilling of wells and putting them into production, but that is as far as the expenses were supposed to be paid by [481] the Potlatch and the Troy-Sweet Grass, drilling the wells and putting them into production. That was my interpretation of it. That is what I understood it was, what the contract called for.

Q. Was it your contention that Potlatch was to pay no part of the cost of operation after the well was drilled and put in production?

A. Well, no. It was my contention that they wasn't to pay after the wells was drilled and put into production.

Q. The Ohio was to pay the expenses, pay everything?

A. Yes, pay everything.

Q. Without any part of the charge being made against Potlatch?

A. Not after they were producing.

Q. That would include all costs of operation?

A. Yes, sir.

Q. No part of the cost of operation, pumping the well, would be paid by Potlatch or Inland Empire?

A. Nothing off of the lease.

Q. No, I mean no part of the cost of operating the well would be paid by Potlatch after the well was once drilled and put on production? Is that what we are to understand?

A. They were to operate the lease. We were to pay for drilling the wells or getting them to producing. We were to pay—then they were to operate

(Deposition of T. P. Jones.)

the wells and give us our forty-five per cent, and they were to charge us nothing after that.

Q. Charge you nothing after that?

A. No.

Mr. Everett: Let me see that contract a minute. [482]

(Exhibit 2 handed to counsel.)

Q. The contract about which you testified earlier, Mr. Jones, reading from Paragraph 3 of Plaintiffs' Exhibit 2, provides, and referring to The Ohio Oil Company as party of the second part: "It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part forty-five per cent thereof." A. Yes.

Q. Now, am I to understand from your testimony that that doesn't mean what it says? What does that mean to you?

A. My interpretation of the lease was that they should drill the wells and put them in production and we would pay our forty-five per cent of it.

Q. And from there on you pay nothing?

A. No, no.

Q. Well, you were to pay your cost of operation, then?

A. Well, that wasn't the way I understood it. They were to——

Q. How did you understand it?

A. I understood they would drill the wells and charge us after the first well was drilled, the free

(Deposition of T. P. Jones.)

well, no cost to us at all. Then they would drill the wells and equip them and we would pay our forty-five per cent of drilling the wells and equipment, and nothing for supervision or accounting outside of that, and then after they were drilled they could pump them and take the oil and pay us forty-five per cent of the oil.

Q. What about the cost of operation?

A. Operation would not be much after the [483] well drilled and operating. That was up to them.

Q. And no part of that was to be charged to the Potlatch?

A. Except for the maintenance of the equipment and so on. No labor was to be charged to the Potlatch.

Q. No labor was to be charged to the Potlatch?

A. No.

Q. You testified you were engaged in other businesses. Isn't labor a cost of operation? Is it your contention that labor is not a cost of operation?

A. Yes, I understand all of that. I do lots of business, but we had an understanding what it was to be. Mr. Gee and Mr. Hurley said that would cover the whole thing. That was the clause I had put in there, and there would be nothing charged to us after the wells were put into operation.

Q. You were not to be charged with the cost of operation? Did you read this contract before you signed it?

A. I surely did.

Q. Well, what does "all costs and expenses of developing and operating said lands"—what does

(Deposition of T. P. Jones.)

that mean to you? A. It means what it says.

Q. Were they to make—was it your understanding that any part of the amount charged to you was to be paid in cash—charged to your company; any of the amount, the expenses of developing and operating, charged to Potlatch? Were they to be paid in cash? A. By who?

Q. By Potlatch.

A. No. They were taken out of production, interest and all. [484]

Q. Suppose the charge exceeded the credit, were you to be held beyond that?

A. No, no, no. If they didn't get the production, they were out. We weren't to be held at all.

Q. Well, isn't that what your phrase says here, then: "But in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands"? A. Read that again.

Q. Let's go back. Isn't that what your phrase: "But in no case shall said party of the first part" (referring to the Troy-Sweet Grass) "be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands"? Isn't that what that means?

A. I don't gather what you are driving at. It means just what it says there.

Q. Well, it is payable out of oil? Isn't that what it means? The amount that was charged to you was payable out of oil produced? A. Absolutely.

Q. And that is what you mean by your contract?

(Deposition of T. P. Jones.)

A. Yes, sir, that they are to take their pay out of any oil they find.

Q. So if there was more due than there was oil to pay, the Ohio got nothing?

A. The Ohio got nothing.

Q. And that is what that phrase meant, that they didn't get paid unless the oil was there; unless they had production?

A. That phrase meant that they should charge against that lease nothing only what was on the lease. [485]

Q. That was your contention?

A. Yes, that is the way we understood it right there that day, and that was drilling the well and the equipment that went into that.

Q. You objected also to the interest charges, did you, on the monies advanced?

A. I objected to the interest charges so long as there shouldn't have been any charge to us. They had us charged with a lot of stuff that didn't belong to us and charged us interest on it. I objected to that, of course.

Q. Did you object to any other interest charges?

A. No, not where we legally owned them.

Q. Well, there is a \$10,000 balance they charged you interest on?

A. They charged us interest. Maybe that balance shouldn't have been so big, though. That is what I am contending; that balance shouldn't have been that big, maybe, if they had us charged with a lot of stuff that didn't belong to us.

Q. That was your contention?

(Deposition of T. P. Jones.)

A. Yes, that was my contention.

Q. Did the Ohio, insofar as the balance of the contract, except for the accounting phases of it, comply with all of the provisions?

A. Why, yes and no.

Q. Well, explain your answer.

A. Well, Mr. Hurley impressed upon me that they could drill wells cheaper than anyone else because they had lots of tools in the field and there would only be a charge of reasonable rent for tools in the field against that lease; there [486] would be no tools charged, only rental; and they could drill wells cheaper than I could. I could drill some of them wells for \$10,000 myself; most of them.

Q. Well, there was still a matter of the amount of the charge. So far as complying with the contract, if they were obligated to drill a well, they drilled it?

A. Oh, yes. I had no kick on the accounting of the amount of wells they had drilled on the lease. I hadn't when I left there. I didn't care—when they drilled out there and got water, well, I didn't care about them going on the other side and drilling another water well.

Q. The only complaint you had was the matter of the accounting, the charges? A. Yes, sir.

Q. Otherwise, they complied with their contract? A. On drilling wells, they did.

Q. How was your relationship with the company during that time? A. What?

Q. What were your relationships with the company during the years 1922 to 1932? Were they

(Deposition of T. P. Jones.)

generally pleasant?

A. The Ohio Company?

Q. Yes.

A. Why, the men in the field were gentlemen. They were all right. The men in the field were gentlemen. I don't think they were responsible for overcharging me. They said they had to go to the head of the company.

Q. But Mr. McFadyen—

A. Mr. McFadyen told me he would straighten it up.

Q. Well, he said he would straighten it up. Let me ask [487] you this: Did he tell you that the company would do what they were legally bound to do?

A. Yes. He said anything—that the company was reliable and responsible and he was positive that the thing would be settled up without any lawsuit, and we would get our money that was coming to us.

Q. Well, how much? Your understanding, then, was that the company would do what it was legally bound to do by its contract? Is that the impression you received?

A. My impression was that if they could come around and see that the way I did, they would pay it.

Q. If they could come around and see it that way?

A. Yes, sir; they would pay it, and that was the way I seen it. That is the way I interpreted the meaning, and the way I told him it would have to be

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interpreted. He thought they would get around to it after a while.

Q. Was it before or after you talked to him that you had the discussion with Mr. Firmin?

A. That was before, I think. We talked to—I talked to Mr. McFadyen—or saw him three times about it.

Q. When was that?

A. But the last time I talked to him about it was '27 or '28.

Q. Why didn't you bring the suit that was contemplated against the company?

A. Mr. McFadyen asked me not to, and Mr. McFadyen appeared to be a gentleman. He asked me not to. He said, "We will get this straightened up without a lawsuit."

Q. Was it straightened up at the time you left the company in 1932? [488]

A. No, it wasn't straightened up yet.

Q. Did you in 1926 receive any monthly statements from the company? A. '26?

Q. Subsequent to the time of this conversation you were supposed to have had with McFadyen?

A. Oh, yes. We received a statement every month.

Q. Did you receive any money with those statements?

A. Yes, sometimes. We got it quite regularly sometimes.

Q. How much?

A. Oh, I couldn't say. I would have to go back

(Deposition of T. P. Jones.)

and see the records; sometimes \$5,000 or \$6,000, sometimes \$8,000 or \$10,000.

Q. A month?

A. Yes. I wouldn't be sure of the amount. It is between the two companies, you know.

Q. Were the statements that you talked to Mr. Fadyen about any different than the statements before? A. No, not while I was there.

Q. They had the same items in that they had prior to the time that you talked to Mr. Fadyen, did they?

A. Yes, about the same, but there was no building of the camp buildings or a water system or anything like that after the first one.

Q. Well, weren't there charges for camp expense and water system expenses?

A. Yes, and a little credit sometimes from the camps, which didn't amount to nothing, however. They weren't drilling——

Q. The system of charges wasn't changed, was it?

A. They weren't drilling wells at that [489] time.

Q. But the accounting wasn't changed?

A. No.

Q. You still received the same statements covering the same items?

A. Not always the same items.

Q. Well, the same general category?

A. Items that shouldn't be there sometimes, such as maintenance of cars and supervision and

(Deposition of T. P. Jones.)

one thing and another. They were still in there.

Q. In 1932, had the matter been straightened out, as you put it? A. Had it?

Q. Prior to the time you left?

A. No, it had not.

Q. The same charges were still being made?

A. Yes, not so big because the production had dropped down, you know.

Q. I understand that.

A. The work had shut down.

Q. But the suit wasn't filed prior to the time you left in 1932?

A. No, it hadn't been filed when I left.

Q. Would the minutes of the corporation show why the suit wasn't filed?

A. No, they wouldn't show. The minutes of the corporation wouldn't show. The last minutes that we had, I think, was for the lawyers to talk to them, and they left it to us trustees to go ahead and do what we wanted. Then I talked to Mr. McFadyen, and I told the other fellows we would wait a while to see if he couldn't get it straightened out. [490]

Q. What did you tell them about it in 1932 when you left? A. What did I tell them?

Q. About this Ohio account?

A. I didn't tell them anything. The books were there and everything else was there.

Q. So they could do whatever they wanted to?

A. I didn't tell them nothing. It wasn't my

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place to tell somebody else what to do. I was leaving the company and not directing it. It wasn't my place to tell them anything, but later on I did ask them what they were doing and told them that if they didn't do something pretty soon I might sue them for incompetency, the directors.

Q. What consideration did you pay for your interest in the Inland Empire Oil and Gas Syndicate?

A. The Inland Empire? Well, a dollar a share, whatever I had.

Q. What interest did it have in the Baker lease?

A. Twenty-two and a half per cent.

Q. How did it acquire it?

A. Do you want me to tell you how they acquired it?

Q. Yes.

A. Well, the Inland Empire made a deal on some other description of land. I wouldn't know what it was; a contract the same as this. I was instrumental in making it for the Inland Empire, on another half section some place, and they were to drill a free well on that for the Inland Empire, and I think it was three or four days after they got this lease from the Inland Empire that Mr. Hurley came to me and said they didn't want to drill that well. Now, I am telling you [491] this: Mr. Hurley himself came to me. He came to me and said: "We don't want to drill that well." The lease provided they are to start drilling a well there inside of thirty days, and so Mr. Hurley came to me and said he didn't want

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to start that well. He said there were some more leases in the vicinity of it that he wanted to get before they would commence to drill that well, and he says, "I don't want to drill that well." I said, "Well, let's call in Mr. Gerlough and Mr. Wilson and talk it over," and I called them in, and Mr. Wilson and Mr. Gerlough insisted that he start drilling that well, and I said, "Hold on, Bob and Jean, we want to cooperate with the Ohio as far as we can. They have got a lot of our ground and we want them to stay in the field, and we want to cooperate and do what is right with them. Now, listen here, let's do something else about this." Well, they said, "They ought to drill this well. We want it drilled." That was the only lease they owned in the field, and Potlatch had a lot of it. "Now," I said, "Bob, I will tell you what I will do." They were drilling one for us. They had started drilling on this one. "I will tell you what I will do. I am a director in your Inland Company and president of the other company. Now, that piece of ground over there looks as good as this piece of ground. I can't see any difference on the surface of it. One may be just as good as the other. I will tell you what I will do: I will have the Potlatch deed you twenty-two and a half per cent interest in that lease they are drilling on right now, twenty-two and a half per cent of that, and you deed the Potlatch twenty-two and a half per cent in this in your lease over there, and later on he can drill a well on that lease [492] over there."

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They said, "All right, all right." And so Mr. Hurley took our word for it, and he said, "That is all right. We won't drill there." I said, "Will you be satisfied, Mr. Hurley? You can take just as long as you want to drill that well. We will fix this up amongst ourselves and you can drill that well later on when you get the leases that you require around it." So he did. Well, I was called over home by the Potlatch Lumber Company and we didn't fix up the papers between us, the contract between Potlatch and Inland. I was called over home on some business for the Potlatch Lumber Company, and while I was home I got word this Baker well had come in, and I went back over to Montana, and while I was home, before I got back, Bob Wilson and Gerlough had provided two contracts, as we had agreed upon, assigning a twenty-two and a half per cent of this well to the Potlatch, and the Potlatch to assign twenty-two and a half per cent in that to them, and the well was in, and Mr. Luke, I believe, was our secretary at that time, and so when I came in, I said, "I hear we have got a well, Mr. Luke." "Yes," he said, "but," he says, "we are not going to assign a half interest in that well to Mr. Gerlough and Mr. Wilson." I said, "We are, Mr. Luke. We are going to assign a half interest in that to Mr. Gerlough and Mr. Wilson." He said, "Well, maybe the stockholders would object." "Never mind the stockholders," I said; "our word was given and it is going to go, and if you don't want to assign this as the secretary you can con-

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sider yourself fired and I will get another secretary." Of course, I had authority to do it, and he knew that, and he assigned it. That is how they came to get the interest in that Baker lease, and it was legal and it was all right, and [493] they had their interest in it.

Q. Had you formed your Inland Empire Oil and Gas Syndicate prior to that time?

A. Oh, yes, a long time prior to that, and they had drilled a well over in the east side of the field.

Q. When was this that you are talking about? When did that Baker well come in?

A. In '22.

Q. What time in '22? Was it shortly after the Ohio took it over?

A. Shortly after they took it, because, as I said, I had a rig up on it. I don't remember the time, but I had a standard rig, part of the tools at Kevin and part out on the lease.

Q. What was the number on that?

A. Baker No. 1.

Q. When did Baker No. 3 come in?

A. I can't remember right now. They drilled right along. I don't remember the date of any of them coming in, exactly.

Q. Do you remember whether it was a big well or not?

A. I do. It was supposed to be a big well. It was a big well. It was all right. You asked me the question, how the Inland came to be interested, and I told you the best I could.

(Deposition of T. P. Jones.)

Q. You and Mr. Wilson and Mr. Gerlough were the trustees of the Inland? A. Yes, sir.

Q. And who owned the interest in it?

Q. Who owned it? [494]

Q. Yes, who owned the interest in the common law trust—is what it was. Is that right?

A. Yes. Now, you ask me a question I can't answer. The Mr. Ball that created that company—I will tell you this, now: I had went out and acquired a lot of acreage, and Mr. Gerlough had been working for me as a geologist in the Kevin Sunburst and Cutbank fields, that whole country there, and Charlie Emmons and I worked with him a lot. I brought him out of the University of Idaho, took him over there, and I got done with him and I didn't need him any longer. Mr. Wilson was working over here for me in the Potlatch Lumber Company, and he wanted to go over in the oil field and try his hand. He had a little misfortune in his family or something, and I said, "Bob, see if you can raise money to drill a well." He was with the Government then. He had a brother down in the Palouse country, a farmer, who was pretty well fixed. I said, "Do you think you boys could raise enough money to drill a well?" He said, "I don't know," but he went out with me. I said, "You and he take this half section over here on the east side of the field, raise enough money and drill a well." "Well, you come in with us," he said, "and form a company." I said, "All right." We went in and formed a company. They went over and tried to

(Deposition of T. P. Jones.)

raise enough money among their friends, and they couldn't raise it. I put in some money and they put in some. They wanted \$100,000. So the company was formed. I says, "All right, now, I will tell you. I will get you a fellow that will raise your money, the balance of it, \$100,000." So Mr. Ball of Seattle was over here. He was an insurance man. I knew him very well, and he was in my house and I told him [495] about the properties, and I said, "Mr. Ball, raise these fellows some money and put in some yourself," and he said, "All right, I will raise the rest of the money," and he did. He raised the rest of the money, and I don't know who his people were in Tacoma and Seattle that he raised it from. I don't know and I don't care a snap, but I became a director and then he became a director.

Q. A director in the Inland Empire?

A. The Inland Empire. They drilled a dry well, and I said, "All right, now they have got a dry well," but they had the money. "Now," I says, "drill another."

Q. When was the dry hole drilled?

A. Oh, the fall of '21, on the east side of the field. "All right, here is another half section over here. You raise the money. You have got money enough to drill a well on that. We will deed it over to you. You go up and drill on it." Then the Ohio stepped into the game and they were going to drill the well, drill a free well, but Inland had the money to drill the well. They stepped into the game and

(Deposition of T. P. Jones.)

unedrtook to drill this free well, and it came about that I made the deal.

Q. The one you have just told about?

A. Yes, sir.

Q. How many contracts were there entered into on June 15, 1922, with the Ohio?

A. Oh, somewhere around 2,000 acres.

Q. I mean, how many contracts covered the deal? How many deals did you have that day?

A. We had three, I think, that day.

Q. Had you ever met Mr. Hurley or Mr. Sellery or Mr. Gee, [496] or any of these men before June 15th?

A. Not before the day they walked into my office; not until the day they walked into my office, sir. I never heard of them. The California had been in the deal two or three times trying to make contracts.

Q. How long did it take you to close up the three deals, or whatever number it was?

A. After we got an understanding what it was, what the deals were supposed to be, I just asked them to write them up.

Q. Were there two deals with Troy-Sweet Grass and Ohio, or one?

A. There was—I think there was three different written contracts. One was 1,500 acres. I don't just remember how many. There were three deals that day, and then this deal with——

Q. Were they all Troy-Sweet Grass?

A. No. Potlatch had some acreage. Troy-Sweet

(Deposition of T. P. Jones.)

Grass hadn't yet turned their acreage over to the Potlatch, although they were to do it. They were to do it, and the stockholders were to take the Potlatch stock, and they did, and then the Inland had this other half section, and they made a deal with them the same day. We were all afternoon fixing it up. I don't remember how long; probably from 10:00 o'clock we started the conversation when they came into the office, started the conversation, and it was along in the evening before we got through.

Q. Well, subsequent to 1926, didn't you have another oil company, the Jones Oil Company?

A. Oh, yes, yes. I had that company, too.

Q. Well, didn't you make some deal with the Ohio as to [497] that acreage?

A. No, sir, I never made any deal with the Ohio. They didn't have any acreage in the field at that time.

Q. Well, what time is that you mention now?

A. Well, the Jones oil company was created—took over some acreage of the Potlatch that the Ohio didn't want to drill wells on. They took over some acreage of the Potlatch that the Ohio didn't want, and they drilled some wells on it.

Q. Did the Ohio or Troy-Sweet Grass, did they release from some of those contracts some of the acreage that was included in their contracts?

A. Yes, they did release some of it. I can't just remember what it was. I can't remember the names of it. Give me the map and I can show you where it was.

(Deposition of T. P. Jones.)

Q. If their accounting was all wrong, as you said, how did you enter into those releases with them?

A. I didn't have nothing to do with those. They didn't have any production on that ground. There was some ground where they showed an operation of either \$37,000 or \$40,000 where they had drilled on those leases and got nothing. They couldn't take from this lease and pay for that lease. They could only get off of each lease—If they got production, they could pay the expenses; drill this free well, and then if they got production they could pay the expenses.

Q. Weren't there some other lands that covered the Baker lease that were subsequently leased?

A. No, sir. Every lease with the Ohio was independent by itself. Every lease was included by itself, each lease. One had nothing to do with drilling the well and paying from the production of another lease. That was part of the contract; that [498] this half section with the Ohio would pay itself and that half section would pay itself; each half section would pay themselves.

Q. Well, was the Israel Sinden a producing lease?

A. No, sir.

Q. Didn't that produce gas?

A. Not to amount to anything.

Q. Well, the charges against that lease were included in the same account with the charges against the Irving H. Baker lease and the credits, too, weren't they?

A. No, sir.

Q. They were not?

A. No, sir. They were a separate account.

(Deposition of T. P. Jones.)

Q. Well, the charges as to the Baptiste Sinden——

A. That was another lease that was separate by itself. If they drilled a well on it and didn't get anything, that was their own fault, their own trouble; they couldn't come back on the Baker lease for anything.

Q. What about the teams necessary and feed?

A. They were all the same. Each one was to pay their own. Each lease was to pay for its own.

Q. Let's see this exhibit we had here——

A. Each lease was to pay for its own.

Q. Will you show me in this agreement that you testified to where there is such a provision?

A. What kind of a provision?

Q. That each lease pays for its own expense.

A. This was a lease by itself. It didn't provide—It provides for a free well on this, that they get one free well on that.

Q. You are referring to Plaintiff's Exhibit 2. You say [499] that is a lease by itself. That covers the property described in that, and all of the charges against that property?

A. This don't include the Baker lease at all. We have in our records, I think, someplace, a provision on these leases that the Baker lease—Each of them had a proviso of a free well in it.

Q. (By Mr. Donovan): Do I understand you, Mr. Jones, to say that this Exhibit 2 did not cover the Baker lease?

A. Well, it may. I can't see very good.

(Deposition of T. P. Jones.)

Q. I understood you to say a minute ago that it did not.

A. I was reading the description there, but I can't tell.

Q. Well, will you look at it?

A. Yes, I guess it is on there.

Mr. McCabe: Mr. Jones, does that operating agreement you are looking at describe land in Sections 3 and 4, Township 35 North, Range 2 West?

Mr. Everett: I object to the question even being asked here. This is cross-examination. We are not through with the witness yet.

A. Yes, Sections 3 and 4 are in here.

Mr. McCabe: Now, answer the question.

Q. (By Mr. Everett): Now, you go back to my question a minute. Mr. Jones, do you find the provision in there that makes the charges separate as to each lease that is included in that general description?

A. Will you let me have time to read all of this and see?

Q. Surely. I want you to look at it and see.

A. I don't know whether it is in here or not, but I [500] know that the Baker lease provided for itself and the Sinden and all.

Q. Now, after reading Plaintiffs' Exhibit 2, will you state whether there is any provision in there that provides for separate charges as between leases?

A. I don't find it in there.

Q. When did the Troy-Sweet Grass Oil Syndi-

(Deposition of T. P. Jones.)

cate assign its interest in this lease to Potlatch, Mr. Jones?

A. Well, I couldn't definitely tell you the date. It was sometime after these contracts were made.

Q. Well, was it in 1922 or 1923?

A. In 1923, I think.

Q. Well, at the time of the assignment—I have before me a photostatic copy of an instrument dated August 18, 1923, between Troy-Sweet Grass Oil Syndicate and Potlatch Oil and Refining Company, in which it appears that you assigned everything that Troy-Sweet Grass owned to Potlatch.

A. I think so. Whenever it was done, it was all assigned.

Q. It was all assigned—the whole business?

A. Everything I had.

Q. This instrument I have shows that it was signed Troy-Sweet Grass Oil Syndicate by T. P. Jones, President, attested by J. A. Harsh, Secretary, and it shows it was signed Potlatch Oil and Refining Company by T. P. Jones, President, attested by J. A. Harsh, Secretary. You were acting as president of both companies at that time?

A. When they were signed over and the one was dissolved.

Q. Who owned the shares in the Troy-Sweet Grass Oil Syndicate at that time, or was it in shares? [501]

A. Yes, it was in shares, but I can't remember who all owned it, because Troy-Sweet Grass was created before I got in. Then I bought some shares

(Deposition of T. P. Jones.)

and became the President and Manager of it, and then created Potlatch Oil and Refining Company and transferred it all over to them, and they took entirely stock.

Q. The stockholders in Troy-Sweet Grass took Potlatch stock in exchange? A. Yes.

Q. This meeting that you had on June 15, 1922, where was that, again?

A. In the same offices, Troy-Sweet Grass and Potlatch office and the Inland. It was all right together.

Q. Where was that located in Shelby?

A. It was located on the south side in the old bank building, above the old bank building that used to be there. I forget the name of that bank that used to be there before it went broke.

Q. Was it the front end of the building or back end? A. The top, above.

Q. The second floor?

A. The second floor.

Q. Was it on the south side of the building?

A. The south side of the railroad. That Molts Building, I believe they called it. I don't remember his name now. There used to be a bank there.

Q. Was it a big office or small office, or what size office was it?

A. Well, it was probably as wide as that building and a little bit longer; probably as wide as this building and a [502] little bit longer, divided into four apartments.

Q. Four offices?

(Deposition of T. P. Jones.)

A. Three offices and a sleeping apartment.

Q. Where was it in the town with relation to the railroad?

A. Right south of the railroad and east of the depot a little bit; south of the railroad.

Q. And who was present at the time that you had this meeting at the time you testified that Mr. Hurley and Mr. Sellery and Mr. Gee and Mr. Luke and yourself were there? I believe that was your testimony? A. Yes.

Q. Was anybody else there?

A. Not until we came to the Inland Empire Oil and Gas Syndicate in the afternoon.

Q. Who was there representing the Inland in the afternoon?

A. Mr. Wilson and Mr. Gerlough.

Q. They were there in the afternoon?

A. Yes, or in the evening, whatever time it was in the evening that we made the Inland contract. Troy-Sweet Grass and Potlatch had made theirs first, and they were in their own office.

Q. Now, who was "they"?

A. Gerlough and Wilson.

Q. They were in their own office?

A. Yes, they had an office right in the same building, on a corner of the building. Troy-Sweet Grass and Potlatch had the front end, half of the building.

Q. Who was there at the time Mr. Gee and Mr. Hurley— [503] Who was there when you made the deal?

(Deposition of T. P. Jones.)

A. Me and Mr. Gee and Mr. Hurley. Mr. Sellery came in after we got started.

Q. Was Mr. Luke there?

A. Mr. Luke was in the other room, yes.

Q. He was right there with you?

A. He was and he wasn't. There was two rooms. The door was open. I was in one room talking to them and he was in the other room.

Q. You say Mr. Gee left, or did he just go in the other room and patch this up?

A. No, he went over to his own place, the Johnson Building, I believe they call it. He had rooms over there.

Q. Did Mr. Hurley leave?

A. Mr. Sellery left and Mr. Gee. Mr. Hurley, I believe, stayed and talked with me until they came back.

Q. Where was the contract signed?

A. In the office there.

Q. The contract was signed by you and Mr. Luke, and Mr. Sellery, I believe, as a witness?

A. Yes, sir.

Q. And by Mr. Hurley? A. Yes.

Q. Were you all there at the same time when that was signed?

A. Yes, all there at the same time. When we had the agreement all ready to fix up, we walked in to where Mr. Luke was and we all—because the seal of the Potlatch and Troy-Sweet Grass was in there; not in the room that I was in. We walked in there and signed up the agreement. [504]

(Deposition of T. P. Jones.)

Q. In Mr. Luke's presence and the presence of each other? A. Yes, sir.

Q. Everybody who signed, signed it right there at that time? A. Yes, sir.

Q. Do you know who signed first?

A. Well, I wouldn't be sure whether it was Potlatch or Troy-Sweet Grass or—I think it was the Troy-Sweet Grass probably signed first. I wouldn't be sure which of us signed first, the Ohio or Troy-Sweet Grass.

Q. Of those two that signed, you signed for Troy-Sweet Grass and Potlatch?

A. Mr. and Mr. Luke signed for them.

Q. You don't recall what order, who signed first, or how the papers were handled there?

A. No. We walked in and sat down and Mr. Luke got out his seal, and Mr. Hurley and Mr. Gee was there. Mr. Hurley said it was all right, and I said it was all right, and so we all sat down and signed it.

Q. Did Mr. Gee sign any of the papers?

A. No, he didn't; not to my knowledge. We sat around a desk pretty near as long as that and a little wider, I guess (indicating counsel table in court room).

Q. How many contracts like this one, Plaintiffs' Exhibit 2, were there?

A. Well, the first time there was one, and then he came back. He wanted another piece of ground. I don't remember which one it was, and he wrote up a contract on that.

(Deposition of T. P. Jones.)

Q. They were all identical, were they? [505]

A. They were all identical.

Q. But you don't remember which contract, affecting which property, was signed up first?

A. No, I don't, but I think it was that one there.

Q. You think it was this one?

A. Yes, I think so.

Q. This is Plaintiffs' Exhibit 2, you are talking about?

A. Yes, I think that is the one that was signed first, and then there was another piece of ground, and Mr. Hurley said to Mr. Gee, "You better draw up a contract on that," and I don't know what it was now. He drew up a contract and we signed it. When we got through, Mr. Wilson and Mr. Gerlough came in, because Mr. Gee or Mr. Hurley said they wanted this half section, and he said, "We want this half."

Q. Did they make the same contract with the Inland Empire that they had on the other?

A. The same thing.

Q. And that was the last one that was signed?

A. Yes. He said, "We want this half section." I said, "That is the Inland," and they drew a contract on that and Mr. Gerlough and Mr. Wilson signed that and Mr. Hurley.

Q. That is the contract with the Inland?

A. Yes. I don't remember the description of it now.

Q. Well now, these contracts, were they all 55/45 contracts? A. Yes, every one of them.

(Deposition of T. P. Jones.)

Q. Did you have any other contracts in the field that were 55/45 contracts? A. No.

Q. With anyone else? [506] A. No.

Q. Or did anyone else up there, to your knowledge?

A. I have no knowledge of any other people's contracts at all; only my own.

Q. Were you familiar with the general operations up there, the leases and the deals that were being made?

A. Well, I was trying to be. I had about 30,000 acres.

Q. Well, you were familiar with the transactions that were taking place in a general way?

A. Yes, sir.

Q. That was your business, to be familiar?

A. Yes, sir. I don't know whether I was familiar with all of them or not. I don't think I was, but I—

Q. Was this type the type of contract that was being used in the area about that time?

A. I think that was the first contract that was made in that area.

Q. This was the first one, this Troy-Sweet Grass-Ohio deal?

A. I think that was the first contract that Hurley or Gee or any of them had made in that field; that is, they said it was, anyhow.

Q. You talked to Mr. McFadyen, I think you said, in front of the filling station. Is that right?

(Deposition of T. P. Jones.)

A. Yes, he was getting in a car to go to Casper.

Q. Was anyone else there at that time?

A. No. I was over in the hotel and I seen Mr. Fadyen over there. I got out and went over and asked if he had done anything, or if they were going to do anything about it.

Q. I was just asking if there was anyone else there at [507] all?

A. The filling station man may have been standing there.

Q. Did you ever have any other discussions with Mr. McFadyen at any time?

A. Yes; a couple of times out in the field I talked to him.

Q. Was that before or after this one in 1926?

A. Well, '27, I believe it was, I am telling about.

Q. You think it was '27 you are telling about?

A. Yes. A couple of times before that out in the field I had talked to him. I don't know who introduced me to him personally. I had heard he was there and I went out to see him. It might have been Yealy or it might have been Hungerford. There was a man named Hungerford.

Q. Do you remember his first name or initials?

A. We called him "Slim" Hungerford.

Q. What did he do?

A. At one time he was kind of an assistant field man or something. I don't know what his capacity or business was.

Q. Did he work for the Ohio? A. Yes.

Q. He was one of their regular employees?

(Deposition of T. P. Jones.)

A. He was for quite a while. Then I think he went operating for himself later on.

Q. At the time you signed these contracts with the Ohio, when Mr. Hurley and Mr. Gee were present there in 1922, did you have any motion of your trustees?

A. No. I didn't have no meeting of the trustees. I was supposed to be running the thing and doing what I liked, and I did it. [508]

Q. Did you have any meeting of your Board of Directors of the Potlatch?

A. No, I didn't. There was only me and Mr. Luke there.

Q. Did you discuss the terms and provisions of the contract with Mr. Luke or any of the other officers?

A. No, I didn't. I discussed with me, and that was all.

Q. Did you ever talk to Mr. Firmin before or after that one time? A. No.

Q. About which you testified when Mr. J. W. Freeman and all of you were there?

A. No, I didn't.

Q. That was the only conversation you ever had with him? A. Yes, sir.

Q. Did you ever have any discussions—Do you know Mr. Harold W. Stuart?

A. I knew him. I wasn't acquainted with him very much. I knew him, but I never had any discussions with him much. I just knew him because he was there, and he was here and there and all over.

(Deposition of T. P. Jones.)

I never had much discussion with Mr. Stuart. I had met him and talked with him.

Q. In Shelby? A. In Shelby, yes.

Q. Do you know what position, if any, or do you know if he held any position with the Ohio?

A. I don't. I don't know anything about it. Was he a geologist?

Q. No. This is Mr. Hal Stuart. There is a geologist named Stuart. He is not the one I am referring to.

A. That is the one I am referring to. [509]

Q. The one I am talking about is a lawyer in the Ohio Oil Company.

A. Oh, I never seen him up there. The fellow I met was a geologist, and I used to meet him and talk to him.

Q. You never knew Mr. Hal Stuart?

A. No, I didn't.

Q. Did he ever ask you for any instrument in connection with any of your titles?

A. Not to my knowledge; he never asked me.

Q. Did you ever have any correspondence with him about title matters?

A. Not that I know of; not that I recollect of. Our titles were on record and they could find out what they wanted to about them.

Q. Did you ever have any discussion with Mr. Gee subsequent to that one in the office up there?

A. No, I never did. I never seen Mr. Gee after that.

Q. Did you ever see Mr. Hurley after that?

(Deposition of T. P. Jones.)

A. Yes.

Q. When was that?

A. I couldn't tell you the date, but I met him once or twice.

Q. Was it a long time after or shortly after?

A. Oh, no; shortly afterwards.

Q. You met him there; you made that contract June 22nd?

A. The next summer I met him once or twice. I think it was the next summer I met him once or twice. I don't ever remember meeting him again, although I heard he was there, but I never saw him. I was away when he was there a time or two. I heard he was there. [510]

Q. Did you know Mr. W. H. Holland of the Ohio Oil Company?

A. No. I don't know him by name, sir.

Q. He was a man about my build.

A. Well, there was a lot of men about your build.

Q. General Superintendent of the Ohio, and he was up there sometime, I think. I thought you might have met him.

A. No, I never met him.

Q. Did you have any discussions in the Ohio office with reference to these contracts?

A. In Shelby?

Q. Yes, prior to the time that they were entered into.

A. Prior to the time the contract was entered into?

Q. Yes, in June, 1922.

(Deposition of T. P. Jones.)

A. Before they was entered into?

Q. Yes.

A. Why, there was no Ohio office there.

Q. I thought you testified Mr. Gee went across?

A. Yes. He had come in the day before, I think he told me, and got a room over in the Johnson Building on the south side, and I had been down to Great Falls and drove back that night, and the next morning——

Q. He went over to his room, then, to prepare this contract? A. Yes.

Q. Did you have any discussions any place with reference to this deal other than in your office?

A. No.

Q. That was the only place you had any discussion?

A. Yes. I think it was young Johnson that told me when [511] I came up from Great Falls that morning, that night or that morning. I stayed in Brady, I think, all night. I think it was young Johnson told me there was some fellows from the Ohio up in their building wanted to see me. I said, "Well, I am going over to the office." I was busy. I was trying to get ready to drill a well. I said, "You just tell them that it is just as short over there as it is from my office over to them," and pretty soon they came in.

Q. They came in to your office?

A. Yes, sir.

Q. And you never went to their office at all.

A. No, sir.

(Deposition of T. P. Jones.)

Q. Did you ever advise anyone of the Ohio in 1925 or '26 that you were going to drop this matter of erroneous charges? A. No, sir.

Q. Not even after you talked to Mr. Freeman?

A. No, sir. I never advised anybody I was going to drop it. I never had any intention of dropping it, while I was there.

Q. Well, I had a memorandum here prepared by Mr. Gee March 26, 1927, in which he states: "We have a letter from Billstone (you have one there in evidence) received December, 1925. The Potlatch Oil and Refining Company protested our ten per cent overhead charge. They finally decided to drop the matter and decided we were all right." Do you know any reason why Mr. Gee should have made that statement?

A. I don't know of any reason why he should have made it at all.

Q. As far as you are concerned, you gave him no statement [512] or no indication?

A. No indications at all. I had no intentions of dropping it.

Q. When did you leave the Potlatch Company as president and manager?

A. The latter part of March, '32.

Q. March, '32?

A. I think it was the latter part of March.

Q. Did you voluntarily resign and leave?

A. Yes, sir.

Q. Had your resignation been requested?

A. No, it had not. I went broke, and I was in no

(Deposition of T. P. Jones.)

position to stall around in that business. I owed them a couple of thousand dollars and I had to pay it sooner or later. I had went broke. The Jones Oil Company went broke, so I didn't figure I should be running their business.

Q. As a matter of fact, didn't they sue you about that time for the money you owed them?

A. Who?

Q. Potlatch.

A. Not that I ever heard of. I never heard of any suit. I never heard of any suit that had been suing me.

Q. Neither the Potlatch nor the Troy-Sweet Grass or any of these other companies you were associated with over there instituted any suit against you at or prior to the time you left the company in 1932?

A. No, sir.

Q. Did they institute any suits after you left?

A. Not any company that I ever heard of.

Q. You stated you owed them \$2,000 or \$3,000. What was [513] it for?

A. I overdrew my account.

Q. You overdrew your account that much?

A. Yes. I was going broke and I was trying to save myself and I overdrew my account. I expected to pay them some day, and I did.

Q. Were there any suits pending against you at the time you left Shelby in 1932?

A. No, not that I know of. I think this gentleman here (indicating Mr. Donovan) came over to

(Deposition of T. P. Jones.)

investigate something between me and Mr. J. P. Weyerhaeuser.

Q. What was it?

Mr. McCabe: To which we object on the ground it is incompetent, irrelevant and immaterial, not proper cross-examination. It has nothing to do with the subject matter of the suit in connection with which this deposition is taken.

Mr. Everett: I wasn't referring to that particular suit, Mr. McCabe.

Mr. McCabe: Well, you meant any suit between him and the Inland and the Potlatch? I wish you would limit it.

Mr. Everett: No. He answered my question. He said, "This gentleman (referring to Mr. Donovan) came over about another matter between me and Mr. Weyerhaeuser." I wasn't inquiring about that. I was inquiring about a matter of the suit in Montana.

A. There was no suit over there that I ever heard of against me.

Q. Was there any against any of the companies that you represented?

A. Not that I ever knew of. [514]

Q. Am I to understand, then, that at the time you left the company, all your relationships with the company or other directors and so on were entirely pleasant?

A. Yes, sir, and are yet as far as I know.

Q. Did Harris and Hoyt represent your com-

(Deposition of T. P. Jones.)

panies; attorneys at Shelby? Did they represent your company in 1926 and '27?

A. No. I don't know but what I had—I may have had them for some little case. I don't know what it was. I used to go to them and I used to consult with them once in a while about certain matters, and especially on titles once in a while.

Q. Did they represent you in connection with any matter of any claim against the Ohio?

A. No, they did not.

Q. In December of 1927, did you sell any acreage or leases or interest in acreage or leases to the Ohio Oil Company? A. No.

Q. Did you have any past deals with them?

A. No, none whatever.

Q. Either you or any of your companies?

A. Not that I ever knew of.

Q. Did you have an account with the International Refining Company in connection with some of the oil run from some of these leases operated by the Ohio in that field? A. No, sir.

Q. Or did you have any credit with the International Refining Company which you wanted to transfer to your account or any of these [515] accounts? A. None whatever.

Q. Well, I have here a copy of receipt, or authorization, rather, dated Shelby, Montana, April 18, 1928, addressed to the Ohio Oil Company, in which it is stated: "You are hereby authorized to have transferred 3,772.45 barrels Montana oil to

(Deposition of T. P. Jones.)

credit of International Refining Company, pipeage transportation unpaid, and charge to account of International Refining Company."

A. Signed by who?

Q. Signed by T. P. Jones. Is that your signature?

A. It looks pretty damned much like it, but I don't remember ever seeing that thing before or hearing of it.

Q. Well, is it or is it not your signature?

A. It looks pretty much like it, but I couldn't say it was. I don't remember anything about that. I never seen or heard of anything of that kind that I ever remember. Where did I get the oil to transfer? (Reading.) "You are hereby authorized to have transferred"—I'll be damned if I ever believe I signed that. I don't know.

Q. Is that or isn't that your signature?

A. It looks like it, but I wouldn't swear that I ever signed that. It looks like my writing.

Q. You would swear you didn't sign it?

A. No. I don't know what it would be for. I don't know what I would sign it for. We didn't own no oil.

Mr. Everett: Mark this Defendant's Exhibit 1 for identification, which we now offer in evidence as part of this deposition and ask that it be affixed.

Mr. McCabe: To the offer in evidence of Defendant's Exhibit 1, marked for identification, the plaintiffs object [516] on the ground it is incompetent, irrelevant and immaterial, not proper cross-exami-

(Deposition of T. P. Jones.)

nation, no proper foundation has been laid for the introduction of evidence of the exhibit, and it is not within the issues.

(Whereupon, said Authorization marked Defendant's Exhibit No. 1 for identification, was received in evidence and is hereto attached and made a part hereof.)

Q. (By Mr. Everett): Well, did you or did you not have an oil well on the northwest quarter north-east quarter of the northwest quarter of Section 21, Township 35, Range 1 West, in Toole County, Montana, which was on a ten-acre tract? Did you or did you not have such a well operated by the Jones Oil Company; I believe they were the operators? Does that recall anything to your mind?

A. On a ten-acre tract?

Q. It was on the Franklin S. White lease, wasn't it?

A. Oh, listen. The Jones Oil Company never had that lease. The Ohio Oil Company had it and drew some oil from it, from the Potlatch, and then they turned it back to the Potlatch while I was there, and the Potlatch pumped that for something—I don't remember what it was—sometime, and I don't know but what they are pumping it yet, but the Jones Oil Company never had it.

Q. The Jones Oil Company never had it?

A. No.

Q. That is the Franklin S. White lease?

(Deposition of T. P. Jones.)

A. Yes. I think the Ohio drove four or five wells on that lease.

Q. Didn't you sell that ten acres with the well to the Ohio in 1927, or did you? [517]

A. I did not.

Q. Did the Jones Oil Company or Potlatch sell it to the Ohio in 1927?

A. No. I can't remember of selling any such well as that. That is a well that they had driven; they drilled it.

Q. The oil from that well, or any other well—Did you own that oil, Mr. Jones? Had it been run to your account in the Regina Pipeline Company?

A. No, it hadn't been run to my account.

Q. Had it been run to the account of the Jones Oil Company? A. No.

Q. And wasn't that the occasion of your signing this authorization to transfer it to the account of the International Refining Company?

A. No, because I didn't drill any wells there. The Ohio drilled some wells there on that property. I drilled a couple offsetting it, on sixteen, to the Jones Oil Company. I didn't get nothing to amount to anything.

Q. That doesn't bring anything back to your mind? That transaction went as late as 1928 before it was finally concluded? A. How?

Q. It went as far as the fall of 1928 before it was finally concluded, the matter of transferring that oil on that particular tract?

A. I don't remember. At that time I was in the

(Deposition of T. P. Jones.)

east for a good time. The Potlatch had that lease. I think they have got it yet. I think they took that back from the Ohio. The Ohio drew four or five or six wells there and put a [518] pumping plant on it, and I don't know but that—I don't remember. Let's see. The Jones Oil Company, they took a lease on a part of sixteen there.

Q. Do you remember the Danielson lease?

A. Yes, sir.

Q. Do you remember that you took gas from the Danielson lease to operate the White lease?

A. Yes, I remember doing that, after I took it back from the Ohio.

Q. Do you remember purchasing any oil on the White lease and then subsequently selling that lease to the Ohio? A. No. The Ohio drilled it first.

Q. Then releasing it to the Potlatch?

A. The Potlatch paid them for their pumping plant and took over the lease. I don't just remember. It wasn't much. I don't know why he wanted to do it, but he did. The wells were small. He didn't want to be bothered with them, I guess.

Q. Have you had any correspondence with the Ohio Oil Company since 1932?

A. Not a word.

Mr. Everett: That is all.

Mr. McCabe: That is all. [519]

Certificate of Notary Public

State of Washington,
County of Spokane—ss.

I, Geo. J. Stewart, a Notary Public in and for the State of Washington, do hereby certify that the witness T. P. Jones, also known as Thomas P. Jones, in the foregoing deposition named, was by me duly sworn upon oath to testify the truth, the whole truth and nothing but the truth in said cause; that said deposition was taken pursuant to stipulation, a duly certified copy of which stipulation is hereunto annexed and hereby referred to, on the 14th day of November, 1947, between the hours of 10:00 o'clock in the forenoon and 1:45 o'clock in the afternoon of that day; that I stenographically took and transcribed and reduced to writing in typewritten form and recorded the testimony of said witness, and when completed said deposition was carefully read by said witness and by him stated to be correct and was by him subscribed in my presence.

I do hereby further certify that all objections made to the evidence presented have been noted upon said deposition and, at the time of the taking of said deposition, no objections were made to the qualifications of the officer taking the deposition nor to the manner of taking it nor to the conduct of any party nor any other objection to the proceedings, excepting objections to the evidence presented, which said objections to evidence have been noted upon the deposition as aforesaid.

I do hereby certify that all writings, documents

and exhibits referred to by the witness and offered as a part of his testimony are hereunto annexed and marked, respectively, Plaintiffs' Exhibits Nos. 2, 26, 27, 28, 29 and Defendant's Exhibit No. 1.

I do hereby further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorneys, or counsel, and I am not financially interested in the said action.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal as a Notary Public this 9th day of December, 1947.

[Seal] GEO. J. STEWART,
Notary Public for the State of Washington, Resid-
ing at Spokane, Washington.

My commission expires October 19, 1950.

[Endorsed]: Filed December 22, 1949. [520]

[Title of District Court and Cause.]

DEPOSITION OF ROBERT E. WILSON, ALSO
KNOWN AS R. E. WILSON

Appearances:

E. J. McCABE,
Attorney for Plaintiffs.

W. H. EVERETT,
LOUIS P. DONOVAN,
Attorneys for Defendant. [525]

Be It Remembered, That pursuant to the duly certified copy of Stipulation hereunto annexed, and on the 12th day of November, 1947, at my office at Kalispell, State of Montana, before me, Merritt N. Warden, a Notary Public in and for the State of Montana, duly appeared Robert E. Wilson, also known as R. E. Wilson, a witness produced on behalf of the Plaintiffs in the above-entitled action, now pending in the above-entitled Court, who being first by me duly sworn upon oath, was then and there examined and interrogated by E. J. McCabe, of counsel for said Plaintiffs and by W. H. Everett, of counsel for the said defendant, and testified as follows:

Direct Examination

By Mr. McCabe:

Q. Mr. Wilson, please state your full name, age and residence.

A. Robert E. Wilson, 65 years old. Temporarily,

(Deposition of Robert E. Wilson.)

I am here at Kalispell. Browning has been my voting address.

Q. And how long have you been a resident of Montana, approximately?

A. Since 1922. [526]

Q. Did you ever reside in Shelby, Montana?

A. Yes.

Q. And, if so, during what years did you reside there?

A. In 1922, in 1922 the early part, to somewhere of '25 or '26.

Q. Approximately, you resided there about four years?

A. Without checking up I would say approximately four years.

Q. Did you ever hear of the Troy-Sweet Grass Oil Syndicate? A. Yes.

Q. Do you know if they were engaged in business in Montana? A. Yes.

Q. Do you know what the nature of their business was? A. Oil and gas development.

Mr. Everett: Just a minute. For the purpose of the record, Defendant, the Ohio Oil Company, wishes to state that all parties herein have heretofore stipulated that each and all of Defendant's objections as to relevancy, materiality and competency of the testimony of Plaintiff's witness, R. E. Wilson, have been expressly reserved as shown by the stipulation which Mr. McCabe has had affixed to the deposition of Mr. Wilson. I understand that upon any trial in which such deposition is permitted to be used, that

(Deposition of Robert E. Wilson.)

the presentation thereof will be question by question, so that defendant shall have the unrestricted and unqualified right to make any objection it wishes as to each such question so presented, this without prejudice to any right Defendant may have or wish to assert as to the entire deposition. For example, if it should be stricken from the files, should it appear therefrom or from the pleadings, files or records in this cause, that this is an attempt to open up a stated account or to vary the terms of a written contract by parol evidence [527] or that it is in violation of the rules which do not permit testimony as to oral conversations or direct transactions with any deceased employee or agent of this defendant, or that it appears that the transactions complained of have been ratified or confirmed, or that the statute of limitations or laches and stale demand has barred any right of recovery, or if it appears that the plaintiff's, or any of them, are estopped from questioning any of the items referred to in the pleadings, or if for any adequate reason such deposition should be stricken in its entirety; if that is the correct statement, Mr. McCabe, of our understanding, then we do not expect to assert our specific objections to each question at this time that you ask Mr. Wilson, and I think that the deposition will be shortened by that.

Mr. McCabe: That is agreeable, and that is our understanding, with the exception that no objection may be urged at the trial as to the form of the question, as provided for in the stipulation for the taking of the deposition.

(Deposition of Robert E. Wilson.)

Mr. Everett: The stipulation stated no objection would be made as to the form of the question.

(Direct examination of Mr. Wilson continued by Mr. McCabe.)

Q. Are you acquainted with T. P. Jones?

A. Yes.

Q. And are you acquainted with Jean Gerlough?

A. Yes.

Q. How long have you known these gentlemen, respectively?

A. Jones, about something like 33 years. Gerlough, since 1922.

Q. Did you, at any time, sign with T. P. Jones and Jean P. Gerlough, a writing, or written instrument, denominated [528] "Agreement and Declaration of Trust of Inland Empire Oil and Gas Syndicate," back in the year of 1922?

A. Yes. We formed the Syndicate in 1922, the Inland Empire.

Q. Were you at any time ever connected in any capacity with Inland Empire Oil and Gas Syndicate?

A. Yes, I helped organize it and I was president of the board of trustees.

Q. And were you trustee under the terms of that agreement? A. Yes.

Q. And did you have any official title?

A. Well, I was just designated as president of the board of trustees.

Q. Who was general manager of the Syndicate?

(Deposition of Robert E. Wilson.)

A. I was acting as so.

Q. And how long did you act as president and general manager?

A. From the time of the forming until—I don't know, I think it was 1925 or 1926.

Q. That is when you left Shelby?

A. Yes. That is only an approximate time. I have been clear away from it, for how long I would have to go back on the records to make a definite statement as to the time I left there.

Q. Did you know, while you were acting as president and general manager of the Inland Empire Oil and Gas Syndicate, the following named persons:

A. M. Sellery? A. Yes.

Q. Mr. A. M. Gee?

A. I rather think he was attorney for the Ohio Oil Company.

Q. Well, did you know Mr. Gee who was acting, or appeared to act, as attorney for the Ohio Oil Company? A. I didn't know him. [529]

Q. And Mr. John McFayden?

A. Yes, he was superintendent of the Rocky Mountain division.

Q. Was that particular McFayden also known as Jack McFayden?

A. That was what he was commonly called, Jack McFayden.

Q. Did you know Mr. L. J. Yealy?

A. Yes.

Q. And did you know Mr. McCracken?

A. Yes.

Mr. Everett: What McCracken?

(Deposition of Robert E. Wilson.)

A. I think Virgil was his name.

Q. To identify the man, did you know Mr. McCracken that worked for the Ohio Oil Company at Shelby, back at the time when you were acting as president for the Syndicate? A. Yes.

Q. Now, at the time you were acting as president and general manager of the Inland Empire Oil and Gas Syndicate, do you know whether that Syndicate was interested, or, that is, you understood it was interested, in an operating agreement originally purported to have been made between the Troy-Sweet Grass Syndicate and the Ohio Oil Company?

A. We had pending on the Baker Lease—Irvig H. Baker lease—an agreement with the Troy-Sweet Grass, or Potlatch Oil and Refining Company, that had not yet been finished or culminated at the time of the operating agreement between the Ohio Oil Company and the Troy-Sweet Grass. I knew of it.

Q. Did you receive information later that the Inland Empire Oil and Gas Syndicate had purchased an interest in the Baker Lease, and in that operating agreement?

A. We acquired the interest in the Baker Lease subject to the Ohio Oil, the operating agreement with the Ohio Oil Company. [530]

Q. Now, did you ever discuss with Mr. John McFayden any matters in connection with expenses or charges which you asserted to him were improper charges?

Mr. Everett: Just a minute. For the record again I want this objection to show. Defendant objects

(Deposition of Robert E. Wilson.)

to this question and to any testimony in response thereto, or to any similar or related line of questioning and testimony, for the reason that R. E. Wilson, either individually or as one of the assignors or owners, or as an official of the present party Plaintiff, is not competent to testify to any oral conversation, direct transaction, or oral communication with Mr. John McFayden, Mr. F. E. Hurley or Mr. A. M. Sellery, all deceased. In support of this objection, allow me to state that these men were agents and employees of the Ohio Oil Company and are now, and have for many years been, deceased, and if, Mr. McCabe, my statement in that respect isn't sufficient, I can produce death certificates and estate proceedings into this. May it be understood that our same objection—our objection, rather, is to the incompetency of Mr. Wilson to testify in this regard. It extends to all questions and testimony as to——

Mr. McCabe: Any deceased officials?

Mr. Everett: Yes.

Q. Now, did you ever discuss with Mr. John McFayden any matters in connection with expenses or charges which you asserted to him were improper charges under the operating agreement which you have heretofore mentioned in your testimony?

A. Yes.

Q. Just tell in substance what you said to him and what he said to you. [531]

Mr. Everett: It is understood our objection is in?

Mr. McCabe: Yes.

A. I can state it this way: when the operation

(Deposition of Robert E. Wilson.)

began on the Baker Lease after the oil production, we began to get monthly statements from the Ohio Oil Company directly—the Inland Empire Oil and Gas Syndicate—but there was a lot of charges there we, as the trustees, didn't agree to. They were not in the verbal agreements at all, nor, as we thought, up to the contract.

Mr. Everett: Now, I have another objection that I would like to put in right here, in view of his statement just now. We object to any questions or testimony along this line, or to any similar or related line of questioning and testimony for the reason that there has already been testimony to our written agreements and operating contracts in effect between the parties, or their representatives or predecessors or successors in interest, and one of which agreements is shown by the exhibit, Plaintiff's Complaint herein. No mistake or imperfection of the writing is put in issue by the pleadings, nor is the validity of the agreement the fact in dispute. May it be understood, Mr. McCabe, this same objection goes with reference to similar questions and answers, and that eliminates necessity of making them each time.

Q. You may continue, Mr. Wilson.

A. (Continuing): When these monthly reports began to come we would then go over them, and then we took it up with the nearest—the local officer there, Mr. Yealy, and talked to him, and I took it up with Mr. McFayden on one trip, and Mr. Yealy together, and called attention to things—I can't say

(Deposition of Robert E. Wilson.)

just now just what, they were things [532] we didn't think the charges should be in there.

Q. In reply, what did he say, if anything, to you?

A. Well, as I recall back, he referred us to their auditing department and the statement that the Ohio Company was a reliable company and whatever was wrong would be made right. Words to that effect, in that nature.

Q. After your conversation with Mr. McFayden, did you employ any attorneys, that is, did Inland Empire Oil and Gas Syndicate employ any attorney or attorneys to represent them in connection with questions as to proper charges being made by the Ohio Oil Company under the contract?

A. Freeman, Thelen and Frary were already our attorneys for what legal work we had up to that time.

Q. And were they requested to act for you in this Ohio Oil Company dispute?

A. As I recall it, through the—through Mr. Jones, through the Potlatch Oil and Refining Company—successors to the Troy-Sweet Grass—our objections were of the same nature and jointly, and whatever course the Potlatch, the parent company took in the—I wouldn't say the parent company, but we took over acreage from them—we would back them up in it.

Q. And do you know whether Freeman and Thelen were later employed to represent the Inland Empire Oil and Gas Syndicate and the Potlatch Oil

(Deposition of Robert E. Wilson.)

and Refining Company for the matter of taking care of this dispute?

A. I can't say definitely on that. Up until the time I left there and was sick and got clear out of the picture, it was the intention to go ahead, if we couldn't make a settlement, to go ahead and take it to court to get an adjustment on it. I think ours was in the nature of [533] backing Mr. Jones' company, if I make myself clear on that. If I may say, they had made the original contract. It was them that made the original contract.

Q. Mr. Jones was a party to the original contract?

A. Yes, regular working agreement, his company was.

Q. On behalf of whom?

A. The Troy-Sweet Grass Oil Syndicate.

Mr. Everett: For the record, I want to object to the preceding questions with Mr. Wilson as to conversations and so forth with Mr. McFayden, not only for the reasons previously stated as incompetency and the other objection on the parol evidence phase, but as to the form of the question, in that the time and place has not been asked for nor identified as to which or where said conversations were alleged to have taken place, nor as to whom were present.

Q. Mr. Wilson, according to your best recollection, about what year was it, or years, that the conversations that you had with Mr. Jack McFadyen alone, and Mr. Jack McFayden in the presence of

(Deposition of Robert E. Wilson.)

Mr. Yealy, was? Do you remember the approximate years?

A. I can't give you any dates on that. The record will show when the Ohio Oil Company began issuing statements to the Inland Empire Company and the files and letters would show. I believe there was correspondence on the same matter. It would approximately fix the dates as being sometime after the first few monthly statements began.

Q. And were those conversations while you were living at Shelby? A. Yes.

Q. And between the time when you became connected with the [534] Inland Empire Oil and Gas Syndicate and the time you left, as you have heretofore testified?

Mr. Everett: We object to that question as being leading. A. Yes.

Mr. McCabe: I believe that is all.

Cross-Examination

By Mr. Everett:

Q. What was your connection with the Troy-Sweet Grass Oil Syndicate in 1921?

A. I had bought a few shares of stock, that was my only connection with it.

Q. Was that a corporation?

A. No, that was a common-law trust.

Q. You were an owner of a beneficial interest in it in 1921?

A. That or the early Spring of 1922.

Q. Were you an owner of beneficial interest in

(Deposition of Robert E. Wilson.)

the Troy-Sweet Grass at the time the Inland Empire acquired from it an interest in the Baker Lease?

A. Yes.

Q. That same time you were also one of the trustees and beneficial owners of Inland Empire Oil and Gas Syndicate, a common-law trust?

A. On that last statement, you see, this has been a long while. I have been out of the picture. I have been a sick man part of the time. Whether my stock was issued as Troy-Sweet Grass Syndicate stock or issued as Potlatch Oil and Refining stock, successor to the Troy-Sweet Grass——

Q. Well, if it will refresh your memory any, I have a certified copy of an agreement dated May 6, 1922, which purports to be an agreement and declaration of trust of the Inland Empire Oil and Gas Syndicate, and it has been entered into between R. E. Wilson of Boville, State of Idaho, Jean P. Gerlough, Moscow, State of Idaho, and [535] T. P. Jones of Boville, State of Idaho, hereinafter called subscribers, and R. E. Wilson, Jean Gerlough and T. P. Jones as trustees. That is dated May 6, 1922, and appears to have been signed by yourself. You are the R. E. Wilson referred to in that agreement, are you?

A. With the Inland Empire Syndicate, yes.

Q. On that date you, Mr. Gerlough and Mr. Jones were, according to the recital of the instrument itself, you were the subscribers and you were also the trustees of Inland Empire Oil and Gas

(Deposition of Robert E. Wilson.)

Syndicate, is that correct? A. That is correct.

Q. And you acquired from the Troy-Sweet Grass Oil and Gas Syndicate, that is, the Inland Empire Syndicate acquired from the Troy-Sweet Grass Syndicate an undivided interest in the Baker Lease in the Southwest Quarter of Section 3 of the Southeast Quarter of Section 4, Township 35 North, Range 2 West, Toole County, Montana?

A. Those section numbers, that is all out. We acquired an in interest in what is known as the Irving Baker lease.

Q. Prior to that time, you testified that in 1921 you were the owner of a beneficial interest in the Troy-Sweet Grass Oil Syndicate?

A. It was in 1922, rather. It would be early 1922 instead of that 1921.

Q. Did you, as president and manager of the Inland Empire Oil and Gas Company, address any letters to the Ohio Oil Company with reference to the monthly account you have testified about?

A. It runs in my mind I did, that we took it up with them in the regular way. The records will show. The files of the Inland would show the copies of letters. [536]

Q. Well, what were the nature of those letters?

A. I would say offhand protesting the charges we thought shouldn't be in there.

Q. Did you receive any answer from the Ohio with reference to those protests?

A. That again would have to go to the files. I don't recall.

(Deposition of Robert E. Wilson.)

Q. You don't remember whether you received any answer or not?

A. I don't recall what correspondence came back on the matter.

Q. With the monthly statements that were rendered to you, did you receive any payments from the Ohio?

A. We received payments from the Ohio Oil Company.

Q. And the charges that were made were those that were made under the 1922 agreement between the Troy-Sweet Grass and the Ohio, with reference to which you have testified—the operating agreement?

A. Yes, that was all under the same operating agreement.

Q. Where did the Inland Empire have its offices? A. In Shelby.

Q. When did you leave there?

A. Oh, I would have to look up some of the records back to see whether it was 1925 or 1926. Somewhere along in there. I went to Spokane from there.

Q. During the time you were there, did the Inland Empire share offices with the Potlatch or with the Troy-Sweet Grass?

A. We were in the same building, separate offices.

Q. But connecting with each other or entirely separate? A. Entirely separate.

(Deposition of Robert E. Wilson.)

Q. Would you explain the way it was on the ground as you remember it? [537]

A. It was over the old bank building on the north side of the town. The upstairs come up the hallway and our office set entirely separate from their office in front.

Q. You testified, I think, that you don't remember whether it was 1925 or 1926 that you left there? A. I just don't remember.

Q. Did you resign your job as president and manager at that time? A. Yes.

Q. Do you recall the circumstances which brought about that resignation?

Mr. McCabe: Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

A. Sickness. Nervous breakdown among other things.

Q. Is that all you recall with reference to your resignation, Mr. Wilson?

A. Well, there was always disagreement, as there always is among trustees and directors and so forth.

Q. Who, at that time, were the trustees or directors of Inland Empire?

A. Myself, Jean P. Gerlough, T. P. Jones. Does that record show where Mr. Harsh was or not? I don't recall. I don't have any such record.

Q. Who were the directors and officers of the Potlatch Oil Refining Company at that time?

(Deposition of Robert E. Wilson.)

A. Well, there was Mr. Jones.

Q. Mr. T. P. Jones?

A. Yes. Mr. Harsh. There was a Mr. Ball of Seattle. Let's see, there was some lumberman, I can't recall his name just now

Q. Was the Troy-Sweet Grass dissolved at that time, the time [538] you left, was there still a Troy-Sweet Grass still in existence?

A. No. It was operating—I think it was all out of the picture. It was all Potlatch Oil and Refinery then.

Q. Did you hold any stock in the Potlatch Oil and Refining at that time, just prior to your leaving Shelby? A. Yes.

Q. What did you do with that stock at the time you left—prior to the time you left?

A. Well, I retained it. I hadn't disposed of the interest.

Q. Your interest in Inland Empire, what did you do with it at the time you left?

A. I had sold some of it and I signed over some of that stock to the—I don't know whether it was to the Inland or to Mr. Harsh and Mr. Ball. I rather think it was the Inland. I released it.

Q. What was the consideration for your transferring that interest?

Mr. McCabe: To which we object on the ground it is immaterial and not proper cross-examination.

A. I just don't recall the full amount. It might be something I could go back over later on.

(Deposition of Robert E. Wilson.)

Q. Was the company asserting any claims against you at that time?

A. I don't know. The records would show, what they have in the Inland, if they would be accessible.

Q. Were they or were they not asserting any claims against you?

A. I don't recall. Their books would show whether there was anything charged against me or not.

Q. Well, do you remember whether you were released from any [539] such claims upon assigning the stock to the company at the time you left?

A. I don't recall any such thing.

Q. You think the records should show what transpired there?

A. I should think they would, yes. There was always kept a record. Our books were always audited by a certified public accountant.

Q. Are there any such records at this time, Mr. McCabe?

A. Not that I know of. (By Mr. McCabe.)

Q. Do you have any interest in the Inland Empire Syndicate at the present time? A. No.

Q. How long has it been since you had an interest in the Inland Empire?

A. Oh, I would say whenever—1925 or 1926, somewhere along in there.

Q. Do you recall what disposition was made of your interest at that time?

(Deposition of Robert E. Wilson.)

Mr. McCabe: Objected to on the ground that it is repetitious and not proper cross-examination.

A. I was sick and down on my back and Mr. Harsh and Mr. Ball came up and I made an assignment by the stock for a consideration, I can recall that, but the amount as you asked me before, I don't—

Q. Did they at the same time ask you for your resignation when they come up to see you that you testified about?

A. I don't recall at that time that they did.

Q. But your resignation was given about that time, is that correct?

A. Whether it had been given before that or not I don't know.

Q. What interest, if any, do you now have in the Potlatch Refining Company? [540]

A. I have some shares there, a regular stockholder.

Q. How many shares to do you have?

A. Somewhere around better than five thousand shares.

Q. How many shares did you have in Potlatch in 1925 or 1926 at the time you left Shelby?

A. It would be the same amount. Their records will show that.

Q. When did you first acquire that five thousand, approximately five thousand, shares?

A. At the time in 1922, as I recall it, all of it in 1922.

(Deposition of Robert E. Wilson.)

Q. What did you pay for that stock or was it acquired in a trade?

A. Well, I bought it regular through—when the Troy-Sweet Grass was in existence, and I was issued Potlatch stock. Whatever the shares were in that is what I got.

Q. In exchange for your beneficial interest in the Troy-Sweet Grass Syndicate?

A. I believe that is it. I don't recall I was ever issued any Troy-Sweet Grass stock.

Q. But you did have an interest in Troy-Sweet Grass?

A. It may have come at the time when they were changing it over to the Potlatch, reorganizing.

Q. But the Potlatch stock was issued to you in exchange for your beneficial interest in Troy-Sweet Grass?

A. Yes, if that is the way it would work out.

Q. The monthly statements which were rendered by the Ohio Oil Company on the Baker Lease came to your personal attention? A. Yes.

Q. And you checked each of those statements yourself? A. Yes. [541]

Q. And items which you thought were incorrectly charged, you called to the attention of the Ohio Oil Company?

A. By the means I have testified to, yes.

Q. And what response did you get from the Ohio Oil Company to your letters?

Mr. McCabe: Objected to on the ground that it

(Deposition of Robert E. Wilson.)

is not the best evidence and is improper cross-examination.

Mr. Everett: You brought it out on direct examination that he had received monthly accounts and that he had objected to them. We are entitled to know.

Mr. McCabe: I am not waiving my objection. I am standing on my objection.

A. That I don't recall. You will have to look up the files of the Inland Empire there to find what that answer would be.

Q. Did Inland Empire have any interest in the Kevin-Sunburst field or the Sweet Grass-Arch field, other than the Baker Lease? A. Yes.

Q. Was the Ohio Oil Company the operator of any of those other leases? A. No.

Q. Do you remember who or what other company was the operator of the other leases you mentioned and where were the other leases?

A. That would have to show on your records there. I think you probably both got it. There was, I don't think, anybody operating in the other leases.

Q. I have here a copy of a Western Union telegram, signed by—addressed to R. E. Wilson, Davenport Hotel, Spokane, Washington, and signed by J. P. Gerlough, with the date [542] line Shelby, Montana, September 25, 1923, in which it is stated, "Letter from Hurley states all charges fair and that we have no just cause for complaint. Suggest would discontinue interest on money if we wish to

(Deposition of Robert E. Wilson.)

pay our share current operating expenses." Do you recall, or did you receive, such a telegram?

Mr. McCabe: To which we object on the ground it is incompetent, irrelevant and immaterial, not the best evidence. The telegram speaks for itself, and it is improper cross-examination.

Q. Did you have such a telegram, Mr. Wilson?

A. I don't recall anything about it.

Q. Would you say you never received a telegram like this?

A. I wouldn't say I didn't. This is all back a great many years ago and I don't—it just doesn't register with me at all.

Q. Where would the original be?

Mr. McCabe: Just a minute, we object to this that it is improper cross-examination and calls for a conclusion of the witness.

Q. You testified that you were the manager in 1923, president and manager of Inland Empire. I show you the copy and see if you remember receiving the original of that, and if you know where it is.

A. I don't recall.

Q. You stated on direct examination that you had a deal pending with Troy-Sweet Grass at the time the operating contract between that company and the Ohio was entered into.

Mr. McCabe: Objected to on the ground that it is an improper statement of the testimony of the witness. [543]

A. You asked me back there if it was on this Baker Lease. That is the uppermost here. I think

(Deposition of Robert E. Wilson.)

I said I don't recall whether we had completed the deal or not, whether the papers had been signed or not on the Baker lease at the time the Ohio Oil Company and the Troy-Sweet Grass entered into their operating agreement.

Q. Were you present at the time the Troy-Sweet Grass-Ohio deal on the Baker Lease was entered into—the operating agreement?

A. I was not present then.

Q. You were not present at that time?

A. No.

Q. Did you ever hold any office in the Troy-Sweet Grass Oil Syndicate?

A. No. There was a time or two when Mr. Jones and Mr. Harsh, their treasurer, was away and I kept their papers and so forth. I don't think there was ever a time that I was designated in any way as an official of the company. It was more in the nature of——

Q. You did that as an accommodation to them?

A. Yes.

Q. You were not a trustee of the Troy-Sweet Grass? A. No.

Q. At the time you acquired your interest—that is, the time the Inland Empire acquired its interest in the Baker Lease, you were familiar with the terms of the operating agreement between Troy-Sweet Grass and Ohio?

A. That is answered back here a little farther. The deal was pending, whether it had finally been

(Deposition of Robert E. Wilson.)

concluded in Potlatch and the Inland Empire, or whether papers had been signed at the time of the agreement or not, I don't recall. [544]

Q. Did you have anything to do with the making of the operating agreement between Troy-Sweet Grass and Ohio? A. No.

Q. Do you recall at what time the Inland Empire acquired its interest in the Baker Lease?

A. No definite date.

Q. Do you recall the description of the Baker Lease? A. I don't.

Q. Do you recall the approximate amounts that were paid to the Inland Empire for its interest—its 22.5% interest in the Baker Lease during 1923, 1924, 1925 or 1926 until you left that? Do you remember?

A. I don't recall those figures. I think that all that would be available. They would have the record of it.

Mr. Everett: I understand that, and Mr. McCabe has stated, they have copies of all monthly statements.

Mr. McCabe: Not all of the monthly statements. I think we have copies of most of the statements that were rendered, but without examining all of those statements—there are a considerable number—I wouldn't want to say they are all there for the reason that is a matter for somebody that knows of the Inland or the Potlatch. I have a bunch of statements which I think are most of them, but

(Deposition of Robert E. Wilson.)

I wouldn't make the representation that I have all of them.

Mr. Everett: Those will be available to us?

Mr. McCabe: Yes.

Mr. Donovan: And that is from 1922 down to the present day?

Mr. McCabe: Yes. There might be months skipped, but I have statements covering it in a general way in all those years from 1922 down to 1942, inclusive.

Mr. Everett: Is there any contention that monthly statements [545] were not given by the Ohio?

Mr. McCabe: No.

Mr. Everett: Or that in those months in which there were credit balances, they weren't accompanied by check?

Mr. McCabe: Oh, no, there won't be any question as to checks being given at the end of these months.

Mr. Everett: Or that when there was a credit balance, a check accompanied the statement?

Mr. McCabe: Well, there were some months there wasn't any payments made at all.

Mr. Everett: I said if there was a credit balance.

Mr. McCabe: Yes.

Mr. Everett: The check accompanied the statement?

Mr. McCabe: Yes.

(Deposition of Robert E. Wilson.)

Mr. Donovan: You said copies. You mean copies sent to one of your clients?

Mr. McCabe: Yes.

Mr. Donovan: I mean they are the original instruments received by the plaintiffs?

Mr. McCabe: Yes, exactly.

(Cross-examination of Mr. Wilson by Mr. Everett continued:)

Q. I have before me a certified copy for the assignment of oil and gas lease from the Troy-Sweet Grass Oil Syndicate to the Inland Empire Oil and Gas Syndicate, which is recorded in Book 4 of Assignments, at page 258, of the records of Toole County, Montana, in which it is stated that the Irving H. Baker Lease of 1921, between Baker, lessor, and Troy-Sweet Grass Oil Syndicate, covering the Southwest Quarter of Section 3 and the Southeast Quarter of Section 4, Township 35 North, Range 2 West, given the recording reference of that lease, and also reciting [546] that subsequent to such lease that the Troy-Sweet Grass entered into an agreement with the Ohio Oil Company, "which said operating agreement was filed with the County Clerk and Recorder in and for said county of Toole on the 16th day of June, 1922," given the recording reference, and which recites further that the Inland Oil and Gas Syndicate is desirous of purchasing an undivided one-half interest of the said Troy-Sweet Grass Oil Syndicate, "as subject to the interests of the Ohio Oil Company, a corporation

(Deposition of Robert E. Wilson.)

in the said lease above-described and shown by the assignment filed June 12, 1922," and then goes on and conveys to the Inland Empire Oil and Gas Syndicate an undivided half interest, subject to the rights of the Ohio, which said instrument is not dated, but which is acknowledged by T. P. Jones and J. A. Harsh, as president and secretary of Troy-Sweet Grass, before John N. Thelen, Notary Public, on January 1, 1923. Was the original of that instrument delivered to you, Mr. Wilson?

A. I don't recall that. That assignment to us there undoubtedly was.

Q. Well, it recites that it was made subject to the operating agreement to, or with, the Troy-Sweet Grass and Ohio. Is that a correct statement?

A. Yes, that is right. Our interest was subject to the operating agreement.

Q. Did you know the terms and provisions of the operating agreement at the time of this assignment?

A. I don't recall on that.

Q. Would you say that you were not familiar with the terms and provisions of the operating agreement at the time of this assignment? [547]

A. I can only say that we had talked over the general terms of what the operating agreement would be if it hadn't already been made and we went ahead and took the lease subject to that it interfered with our going ahead and making—finishing the deal on the lease, if that is an answer to it.

Q. You testified that you had nothing to do or, rather, that you were not in on the settlement of

(Deposition of Robert E. Wilson.)

the terms of the operating contract between Ohio and Troy-Sweet Grass.

A. I was not there at the time of the signing of the contract, operating agreement.

Q. Let me ask you this question, then. If you were not present at the time the Troy-Sweet Grass contract was made up and you took an assignment of an interest that was covered by that operating agreement, wouldn't it be reasonable to assume you were familiar with the terms and provisions of that operating agreement prior to the time you took the assignment, which states that it is subject to that contract?

A. That is reasonable to believe. I was familiar with the terms of the agreement or what they were to be. Whether I had read the contract or whether it was in general discussion with my own people and Mr. Sellery and others that I heard what it was to be——

Q. Well, if you can't remember that, how can you remember what Mr. McFayden is supposed to have said?

Mr. McCabe: We object to that question on the ground it is argumentative.

Mr. Everett: This is cross-examination.

A. I don't remember the exact words of Mr. McFayden, only in general reply when I am answering. This other was by [548] discussion or I had read the contract, one or the other, I don't remember which.

(Deposition of Robert E. Wilson.)

Q. But were you familiar with the terms of it?

A. I have answered before I was familiar with what the operating contract was to be.

Q. Was Mr. J. W. Freeman in Shelby, at the time the operating agreement was drafted?

A. I don't recall.

Q. Who was your attorneys at that time?

A. For anything we may have had it would be Freeman, Thelan and Frary.

Q. Which member of that firm usually represented you?

A. Well, there was the whole firm. Most of their work was for the Potlatch Oil and Refining Company.

Q. Was any member of that firm residing in Shelby at that time?

A. I don't think so. Mr. Thelen was up there, Frary was up there quite often, and as I recall, Mr. Freeman was quite often up there at court, not necessarily on our business. He was quite often up there.

Q. They represented Inland Empire in connection with all of its legal matters?

A. So far as I recall.

Q. Were there any other firms of attorneys that represented you? A. Not to my knowledge.

Q. Who were the other trustees of Inland Empire Oil and Gas Syndicate during the time you were in Shelby?

A. Mr. Jones, Mr. Gerlough, Stanley H. Hodg-

(Deposition of Robert E. Wilson.)

man, and I think the record would show it over there, a Mr. J. A. Harsh.

Q. Those were all who acted as trustees during the time you were there? [549]

A. I think so.

Q. Who were the trustees at the time you acquired the interest from Troy-Sweet Grass in the Baker Lease?

Mr. McCabe: To which we object on the ground it is not the best evidence and is improper cross-examination, and the document speaks for itself, the document of assignment.

A. Look up the record on that. Haven't you got a purported copy of it there somewhere?

Q. I am asking your recollection.

A. You would have to go back there and find out whether Stanley Hodgman was trustee at that time with the rest of us or not, I don't recall.

Q. You don't remember who the trustees were at that time?

A. I remember myself, Gerlough and Jones, but whether Hodgman, who was appointed a trustee, was at that time or not——

Q. Do you recall at what time or at what place, or at what times or what places you had these discussions with Mr. McFayden about which you have testified?

A. I can't recall the dates on that, but it was at the Ohio Oil Company's office in Shelby.

Q. During the time that you were in Shelby yourself?

A. Yes.

(Deposition of Robert E. Wilson.)

Q. That would be prior to 1925 or 1926, whenever you left there? A. Yes.

Q. But you can't state just when it was during that time?

A. No, I couldn't give you no definite date.

Q. Well, did you discuss these statements with him once or twice, or how many times? [550]

A. I only recall one definite meeting with Mr. McFayden at their office with myself.

Q. Who was present at that meeting?

A. Mr. Yealy.

Q. Mr. Lee Yealy. Was anyone else present?

A. I don't think so. I don't recall that there was.

Q. You know Mr. McFayden is dead?

A. I hadn't known it until you said he was deceased.

Q. Do you recall having received any money or any check from the Ohio subsequent to the time you had that discussion with Mr. McFayden?

A. I don't recall.

Q. Did you receive any money from the Ohio?

A. The Inland Empire did receive money from the Ohio Oil Company, yes.

Q. Do you remember whether it was before or after you had the discussion with Mr. McFayden, or both before or after?

A. I don't recall that point. It is reasonable to assume that we had not yet began to receive checks on that. It is reasonable to assume that we would protest as soon as possible on that.

(Deposition of Robert E. Wilson.)

Q. Do you recall having called any erroneous charges to the attention of the Ohio, any claimed erroneous charges?

A. Well, that was the purpose of seeing Mr. McFayden. I don't recall what those charges are now. Correspondence over there would show it, I don't recall. I couldn't give you the statement of what charges.

Q. Did you receive any explanation as to the charges which were made and you claimed to be erroneous?

A. I don't recall we ever got any satisfactory answer on that.

Q. Did they ever answer you at all? [551]

A. Well, I think surely there is a lot of correspondence back and forth on that, isn't there? They must have answered us on it. Mr. McFayden—I can state again in a general way, he said if there were errors there, his company was responsible, or words to that effect, the general impression that they would straighten out whatever wasn't right.

Q. Did you write to the accountants after that?

A. The record would have to show on that.

Q. Did you receive an answer from the accountants with reference to those items?

A. The record would have to show on that. The files would show, but I don't recall.

Q. Mr. McFayden didn't state his company would do anything other than what was required by the contract, did he?

(Deposition of Robert E. Wilson.)

A. I would say that was his general answer, that they would live up to the contract.

Mr. Everett: I think that is all.

Redirect Examination

By Mr. McCabe:

Q. Mr. Wilson, any correspondence from the Ohio Oil Company, or letters to the Inland Empire Oil and Gas Syndicate, or letters by you as president of the Inland Oil and Gas Syndicate, have you those in your possession?

A. No, sir, I have none of them.

Q. And when you left the Inland Empire, or when you severed your connection with the Inland Empire Oil and Gas Syndicate, where did you leave that correspondence with reference to the files of that Syndicate?

A. All in the files in the office of the Inland Empire Company.

Q. You didn't take any with you? [552]

A. No, I took nothing with me.

Mr. McCabe: That is all.

Recross-Examination

By Mr. Everett:

Q. Mr. Wilson, will you state for the record your mailing address?

A. The present address is 230 Second Street East.

Q. Kalispell?

(Deposition of Robert E. Wilson.)

A. Kalispell. My permanent address is Browning.

Q. I have here a sheaf of letters and copies which were taken from the files of the Inland Empire Oil and Gas Syndicate in Shelby, which Mr. McCabe has permitted me to use, and I wanted to identify them. They are marked for identification, I presume?

Mr. McCabe: Yes.

Q. I refer to Exhibit 4, which appears to be a copy of a letter dated June 8, 1923, addressed to Lee Yealey, Superintendent of the Ohio Oil Company at Shelby, Montana, and is unsigned but indicates the signature, Inland Empire Oil and Gas Syndicate by line for signature, President and Manager. Did you sign and post the original of that letter, Mr. Wilson?

A. I don't know. That date given there, June 8, 1923, would indicate I did write the letter. I was president of the board of trustees at that time.

Q. Well, it was your custom at that time to keep copies of all letters in the files?

A. Yes, keep a record.

Q. So that if this came from your files, would you say it is a true and correct copy of the original of that letter?

A. We can assume that it would be. [553]

Q. I have here Plaintiff's Exhibit 5, and original letter dated June 20, 1923, addressed to the Inland Empire Oil and Gas Syndicate, Shelby, Montana, on the letterhead of the Ohio Oil Com-

(Deposition of Robert E. Wilson.)

pany, signed by J. P. Hutton. Did you receive that in the due course of the mail at the time you were manager? A. I don't recall.

Q. I have a copy of a letter dated September 11, 1923, addressed to F. E. Hurley, Vice President, Ohio Oil Company, Findlay, Ohio, with reference to the I. H. Baker Lease, marked Plaintiff's Exhibit 6 for identification, and which is signed Inland Empire Oil and Gas Syndicate, by line for signature, President. Did you sign and post in the ordinary course of the mails the original of that letter?

A. I assume that I did with that date on there. I was president of the board of trustees at the time.

Q. And I have a letter marked Plaintiff's Exhibit 7, for identification, addressed to R. E. Wilson, President Inland Empire Oil and Gas Syndicate, dated September 22, 1923, signed by F. E. Hurley, on the Ohio Oil Company letterhead. Did you receive that letter through the mails at that time?

A. I don't recall it. I would assume we did under that date, and it was placed in our files along with all our other records.

Q. Could we make that same assumption to all these records?

A. Yes, if this came from the files of the Inland Empire.

Mr. Everett: That is correct, Mr. McCabe?

Mr. McCabe: Yes.

The Witness: Under those dates I would say I was familiar with [554] them at that time.

(Deposition of Robert E. Wilson.)

Mr. McCabe: And that you wrote them and received them? A. Yes.

Mr. Everett: If he will state that I don't think we further need to identify these letters.

A. It is assumed I did because I was handling it at that time and under those dates.

Mr. Everett: I can just read them here, and if you wish to you stop me. As Plaintiff's Exhibit 8, a copy of a letter of October 3, 1924, addressed Ohio Oil Company, signed Inland Empire Oil and Gas Syndicate, President. Letter, copy of letter, December 1, 1924, Exhibit 9, addressed to J. P. Sutton, Assistant Treasurer, Ohio Oil Company, signed President. Plaintiff's Exhibit 10, on the letterhead of the Ohio Oil Company, addressed to Inland Empire Oil and Gas Company, signed J. P. Sutton. Exhibit 11, copy of letter dated January 30, 1924, addressed F. E. Hurley, Vice President, Ohio Oil Company, Findlay, Ohio, signed Inland Empire Oil and Gas Syndicate, by President. 12, letterhead of the Ohio Oil Company dated March 7, 1924, addressed to Inland Empire Oil and Gas Syndicate and signed W. A. Stephenson.

A. My answer on that was all right was it, Mr. McCabe?

Mr. McCabe: What do you mean, your answer?

A. Well, that I assume under these dates that I had read this correspondence that is in the files there.

Mr. McCabe: Well, I don't know. These letters are from the files of the Inland Empire?

(Deposition of Robert E. Wilson.)

A. I am not swearing I am familiar with all of this, am I?

Mr. McCabe: You haven't read them, have you?

A. No. [555]

Mr. McCabe: Let him read the correspondence.

Mr. Everett: I have no objection to him reading the correspondence if he wants to take that much time.

Mr. McCabe: You were president of the Inland Empire Oil and Gas Syndicate at those times?

The Witness: During the dates these letters are dated, yes.

Mr. McCabe: And there was no one else in the Syndicate that had that title as president?

The Witness: Not while I was there.

Mr. McCabe: And you assume, by reason of the fact that it does appear as president, you would say you sent them out to the addressee?

The Witness: That is it. Here is one January 23, 1925, R. E. Wilson typewritten in.

Mr. Everett: That is the file copy from the Inland Empire files.

Mr. McCabe: But while you were acting as president during the years, Mr. Wilson, then you would be the one that would sign letters sent out under your signature as the president?

The Witness: As president, I would be the one to sign those.

(Recross-examination of Mr. Wilson continued by Mr. Everett:)

(Deposition of Robert E. Wilson.)

Q. And each of these copies is a true and correct copy of what was sent out?

A. Well, we will assume that is right, yes.

Q. Exhibit 13, copy of letter dated January 23, 1925, addressed to the Ohio Oil Company, Findlay, Ohio, R. E. Wilson, President. 14, copy of letter dated January 28, 1925, addressed Ohio Oil Company, Shelby, Montana, signed Inland Empire Oil and Gas Syndicate, President. 15, original letter dated February 9, 1925, on the letterhead of the Ohio Company, addressed to Inland [556] Empire Oil and Gas Syndicate, Shelby, Montana, Attention: Mr. R. E. Wilson, signed L. J. Yealy. Exhibit 16, letter dated January 28, 1925, on letterhead of Ohio Oil Company, addressed Inland Empire Oil and Gas Syndicate, Shelby, Montana, attention Mr. R. E. Wilson, President, signed J. P. Sutton. Exhibit 17, copy of letter dated January 31, 1925, addressed the Ohio Oil Company, signed President.

Mr. McCabe: Does that pertain to Inland Empire Oil and Gas Syndicate business?

Mr. Everett: I presume it does. It comes from their files.

Q. Exhibit 18, copy of letter dated January 28, 1925, addressed Ohio Oil Company, Findlay, Ohio, signed Inland Empire Oil and Gas Syndicate, President. Exhibit 19, copy of letter dated January 28, 1925, addressed Ohio Oil Company, Findlay, Ohio, signed Potlatch Oil and Refining Company, President. I assume you didn't sign that because you were not president of that company?

(Deposition of Robert E. Wilson.)

A. No, that wouldn't go in.

Q. Attached to those two letters are sheets one and two, marked for identification Plaintiff's Exhibit 18A, page 2 and page 1. Exhibit 20, letter on letterhead of Ohio Oil Company dated February 3, 1925, addressed to Inland Empire Oil and Gas Syndicate, Shelby, Montana, Attention: R. E. Wilson, President, signed J. P. Sutton. Exhibit 21, copy of letter dated February 9, 1925, addressed Ohio Oil Company, Findlay, Ohio, signed President, to which is attached sheet referred to as I. H. Baker farm, entitled "Tanks," marked for identification Plaintiff's Exhibit 21A. Will you look at it?

A. It seems to be in line with the others.

Q. Exhibit 22, letter on the letterhead of Ohio Oil Company dated February 17, 1925, addressed to Inland Empire Oil [557] and Gas Syndicate, Shelby, Montana, Attention: R. E. Wilson, President, signed J. P. Sutton, Assistant Treasurer. Exhibit 23, copy of letter dated May 11, 1925, addressed to Ohio Oil Company, Findlay, Ohio, signed Inland Empire Oil and Gas Syndicate, President. Exhibit 24, letter on the letterhead of the Ohio Oil Company dated May 28, 1925, addressed to R. E. Wilson, President, Inland Empire Oil and Gas Syndicate, signed F. A. Billstone.

Mr. McCabe: The Plaintiff now offers as part of the examination of testimony and deposition of R. E. Wilson, the writings identified as follows, concerning which the witness has testified: Plaintiff's Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16,

17, 18 and Plaintiff's Exhibit 18A page one and Plaintiff's Exhibit 18A page 2, Exhibits 20, 21, 21A, 22, 23 and 24.

Mr. Everett: Our same objection as previously stated in the record applies to each and all of these exhibits. [558]

Certificate of Notary Public

State of Montana,
County of Flathead—ss.

I, Merritt N. Warden, a Notary Public in and for the State of Montana, do hereby certify that the witness R. E. Wilson, also known as Robert E. Wilson, in the foregoing deposition named, was by me duly sworn upon oath to testify the truth, the whole truth and nothing but the truth in said cause; that said deposition was taken pursuant to stipulation, a duly certified copy of which stipulation is hereunto annexed and hereby referred to, on the 12th day of November, 1947, between the hours of 2 o'clock and 4 o'clock in the afternoon of that day; that one R. L. Robertson, under my direction and control and in my presence, stenographically took and transcribed and reduced to writing in typewritten form and recorded the testimony of said witness, and when completed said deposition was carefully read by said witness and by him stated to be correct and was by him subscribed in my presence; that the deposition is a true record of the testimony given by said witness; that the

certificate of said R. L. Robertson is hereto attached.

I do hereby further certify that all objections made to the evidence presented have been noted upon said Deposition, and, at the time of the taking of said Deposition, no objections were made to the qualifications of the officer taking the deposition nor to the manner of taking it nor to the conduct of any party nor any other objection to the proceedings, excepting objections to the evidence presented, which said objections to evidence have been voted upon the deposition as aforesaid [559]

I do hereby certify that all writings, documents, and exhibits referred to by the witness and offered as a part of his testimony are hereunto annexed and marked, respectively, Plaintiff's Exhibits 4 to 24, inclusive. I do hereby further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorneys or counsel, and I am not financially interested in the said action.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal as a Notary Public this 6th day of December, 1947.

[Seal] /s/ MERRITT N. WARDEN,
Notary Public for the State of Montana. Residing
at Kalispell, Montana.

My Commission expires January 23, 1949.

[Endorsed]: Filed December 22, 1949. [560]

[Title of District Court and Cause.]

STIPULATION FOR DEPOSITIONS

It Is Hereby Stipulated and Agreed by and between the above-named plaintiffs and defendant, through the undersigned, attorneys of record for said respective parties, as follows, to wit:

1. That the depositions of T. P. Jones, a resident of Bovill, Idaho, and R. E. Wilson, a resident of Kalispell, Montana, may be taken upon oral examination as witnesses on behalf of the Plaintiffs for use as evidence in the above-entitled action, and, in the event the claims of the respective plaintiffs be hereafter ordered severed by the Court, for use as evidence in the actions as severed, the deposition of said T. P. Jones to be taken at Spokane, Washington, before George Stewart, a Notary Public for the State of Washington, at the office of said Notary Public in the Court House, Spokane, Washington, commencing at the hour of 10:00 o'clock in the forenoon on the 14th day of November, A.D. 1947, and continuing until said deposition is completed, and the deposition of said R. E. Wilson to be taken at Kalispell, Montana, before Merritt N. Warden, a Notary Public for the State of Montana, at the office of said Notary Public in Kalispell, Montana, commencing at the hour of 2:00 o'clock in the afternoon on the 12th day of November, A.D. 1947, and continuing until said deposition is completed.

2. It Is Further Stipulated and Agreed that the

right of cross-examination of said witnesses is expressly reserved to the above-named Defendant and all objections as to the relevancy, materiality and competency of the testimony of said T. P. [561] Jones and R. E. Wilson are hereby expressly reserved to said defendant; and when so taken, the said depositions may be used on the trial of said action subject to the same objections (except as to the form of the questions) as if the said witnesses were personally present in court and testifying therein.

Dated this 24th day of October, A.D. 1947.

E. J. McCABE,
Attorney for Plaintiffs.

W. H. EVERETT,
LOUIS P. DONOVAN,
Attorneys for [562]
Defendant.

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of the original Stipulation for Depositions filed in Civil Action No. 956, Potlatch Oil and Refining Company, a corporation, and Jean P. Gerlough, Stanley H. Hodgman, and Roy E. Larson, as trustees of that certain trust known as Inland Empire Oil and Gas Syndicate, a common

law trust, vs. The Ohio Oil Company, a corporation, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Great Falls this 8th day of November, A.D. 1947.

[Seal] H. H. WALKER,
Clerk.

By ELIZABETH C. McKEE,
Deputy Clerk.

[Endorsed]: Filed November 7, 1947. [563]

[Title of District Court and Cause.]

DEPOSITION OF A. M. GEE

Be It Remembered that pursuant to Notice and Interrogatories and Cross-Interrogatories hereto attached, the Deposition of A. M. Gee was taken on behalf of the defendant in the above-entitled action now pending in the United States District Court, for the District of Montana, at the office of Viola Snyder, a Notary Public, in Hancock County Court House, Findlay, Ohio, beginning at 9:30 o'clock a.m., on the 17th day of November, 1948, before Viola Snyder, a Notary Public, whose address is Hancock County Court House, Findlay, Ohio. Said A. M. Gee was first, by me, duly sworn upon oath, and testified as follows:

(Deposition of A. M. Gee.)

Answers to Direct Interrogatories

Answer to Interrogatory No. 1:

A. M. Gee, 539 South Main Street, Findlay,
Ohio.

Answer to Interrogatory No. 2:

Director and General Counsel of The Ohio
Oil Company.

Answer to Interrogatory No. 3:

Yes, sir.

Answer to Interrogatory No. 4: [566]

Since June, 1920.

Answer to Interrogatory No. 5:

Yes, sir.

Answer to Interrogatory No. 6:

Yes, sir.

Answer to Interrogatory No. 7:

(a) I was consulted by certain representatives of The Ohio Oil Company about an agreement that had been negotiated with the Troy-Sweet Grass Oil Syndicate and the Potlatch Oil and Refining Company, and I was requested to prepare myself to draft the operating agreements and assignments of the oil and gas leases involved. The leases involved in the Troy-Sweet Grass contract here in question are described in Exhibit "B" attached to Plaintiff's Complaint. The representatives of The Ohio Oil Company who consulted with me were

(Deposition of A. M. Gee.)

Mr. F. E. Hurley and Mr. A. M. Sellery. Mr. Sellery had already talked with Mr. Jones and Mr. Luke and he then took Mr. Hurley and me to see Mr. Jones and review the matters and discuss them with him. From all these men I learned of the exact terms and conditions of the operating agreement that was to be drawn. I then prepared the instruments for signature of the parties.

(b) F. E. Hurley, A. M. Sellery and T. P. Jones, during the discussions, and Kenneth G. Luke was present, of course, when he signed as Secretary.

(c) The agreement here in question was prepared by me in Shelby, Montana, after our talk with Mr. Jones.

(d) No, sir; no changes were made.

(e) None made.

Answer to Interrogatory No. 8:

Yes, sir.

Answer to Interrogatory No. 9:

(a) In Shelby, Montana.

(b) T. P. Jones, Kenneth G. Luke, F. E. Hurley, A. M. [567] Sellery, and A. M. Gee.

(c) Mr. Sellery had talked to representatives of the Troy-Sweet Grass Oil Syndicate first. He had learned that a deal could be made. Thereafter he reported the matter to Mr. Hurley. I was called in. From Mr. Sellery we heard that a deal could be made with the Troy-

(Deposition of A. M. Gee.)

Sweet Grass. Mr. Sellery had talked over and he had already worked out the terms and conditions of an operating agreement. Mr. Hurley and I went with him to see Mr. Jones. The matter was discussed and reviewed by all of us and agreed to by Mr. Jones and Mr. Hurley. I was then asked to prepare the necessary operating agreement and assignment for execution of the parties. This I did. Mr. Jones signed the operating agreement for the Troy-Sweet Grass as President. He then got Mr. Luke to sign it as Secretary of the Syndicate. Mr. Hurley signed it for the Ohio as Vice-President. Mr. A. M. Sellery signed as a witness for the Troy-Sweet Grass men. We had to send the contract to our General Office at Findlay, Ohio, for the signature of our Secretary, Mr. C. L. Fleming. The only discussions that took place between the parties when I was present before drafting the operating agreement and the assignment of the leases were those that related to the terms and conditions as they now appear in the contract. No objections were made to the contract as written and I was not requested to rewrite it.

Answer to Interrogatory No. 10:

Not in the very beginning, but I was present when the agreement was consummated. But, as I have already stated, the facts were reviewed

(Deposition of A. M. Gee.)

and explained to me in the presence of both sides.

Answer to Interrogatory No. 11:

In Shelby, but I cannot say exactly when and where it was done. It could have been in their office or in ours, or both. Shelby was a comparatively small town and easy to get around in. I am certain that I saw the persons above named in Shelby and heard [568] them discuss and review the terms and conditions of their agreement. I was in Shelby during most of the month of June, 1922. Our Company was then working on other deals with other persons and we were busy making arrangements for drilling on several different properties. The discovery well of Sunburst Oil and Gas Company had just come in and everybody was excited and very busy. I was in and out of Shelby for several months following. My office was in Casper, Wyoming, but I was obliged to and did make frequent trips to Shelby during that summer.

Answer to Interrogatory No. 12:

That is not exactly correct because Mr. A. M. Sellery had already talked with Mr. Jones, then head of the Troy-Sweet Grass Syndicate, and Mr. Luke, Secretary. Mr. Sellery had already worked out the terms and conditions of the operating agreement. He then took Mr. Hurley and me to see Mr. Jones and to get his con-

(Deposition of A. M. Gee.)

firmation of the deal he had reported to Mr. Hurley about. I learned then that the Troy-Sweet Grass and the Ohio were actually willing to make and enter into a contract whereby Troy-Sweet Grass would assign to the Ohio 55% of its interest in and to all of the oil and gas leases that are referred to in Exhibit "B" attached to Plaintiff's Complaint, and that these parties would also make and enter into an operating agreement whereby the Ohio would obligate itself to assume full responsibility for the development and operation of these lands for oil and gas purposes pursuant to these leases; also, that the Ohio would obligate itself to put up all of the money that would be required to develop and operate these lands, and that it would look solely to the proceeds to be derived from any oil and gas that might be produced, saved and marketed therefrom for reimbursement of all advancements made to and for the account of the Troy-Sweet Grass. In addition, it was agreed that the Ohio would put up all the money to drill the first well and drill it free of cost to the Troy-Sweet Grass. All of this was made clear to me by [569] both parties and I was then asked to prepare the assignment and the operating agreement at once. I did so at our office in Shelby. These instruments were presented to Mr. Jones for approval. When they were presented to him, there were no objections made

(Deposition of A. M. Gee.)

to the provisions thereof. He signed them and got Mr. Luke to do likewise as Secretary of the Syndicate.

Answer to Interrogatory No. 13:

No, sir. I know that no one in our meeting with Mr. Jones ever made any such statement as he has made. I was never asked to write nor did I offer to write a contract with a clause therein whereby we would agree to exclude expenses incurred "off the land of the lease." Such a clause would be so indefinite and uncertain as to subject the operator to costs of an unknown amount. Certainly no one at that time could possibly have estimated costs that might be incurred "off the land of the leases" at 10% or any other per centum. If any such conversation had been indulged in, I am certain that I would have remembered it because of its most unusual character. I have no recollection whatsoever of any such demand. The only thing Mr. Jones could have been thinking about in the course of his testimony, in connection with expenses and costs incurred "off the land of the leases," as he puts it, was "overhead cost," which would average about 10%, and I am confident that Mr. Hurley discussed and commented upon that subject, but Mr. Jones offered no objection thereto. In fact, Mr. Jones thought that the amount of overhead, as estimated by Mr. Hurley, was all right. In preparing the contract, if I had been instructed

(Deposition of A. M. Gee.)

to provide that the operating company, the Ohio, would refrain from making a charge against the non-operating company, Troy-Sweet Grass, for all expenses incurred "off the leased premises," it would have been necessary for me to use and I would have used special language to that effect. No such exclusion was agreed upon by virtue of any discussions that I overheard, and from everything that I did hear, [570] I am positive that no such exclusion was ever considered.

Answer to Interrogatory No. 14:

None whatsoever.

Answer to Interrogatory No. 15:

I certainly did not.

Answer to Interrogatory No. 16:

No, sir.

Answer to Interrogatory No. 17:

No, sir.

Answer to Interrogatory No. 18:

No, sir.

Answer to Interrogatory No. 19:

No, sir.

Answer to Interrogatory No. 20:

No, sir; absolutely not. If any such agreement had ever been made, I would not have thought of including in the operating contract the word "operating" as it so frequently appears therein, in connection with the division

(Deposition of A. M. Gee.)

and sharing of the expenses incident to developing and "operating" the leased premises. An operator cannot escape expense in connection with the drilling of wells upon lands, neither can he escape operating expense in connection with the pumping or producing of oil therefrom. These are inescapable development and operation expenses. They are the normal, usual and ordinary expenses, that each one must suffer regardless of who he is. As a lawyer I knew that and I would not have included the "operating" costs if I had heard the principals agree to exclude them.

Answer to Interrogatory No. 21:

No, sir. By that clause it was definitely understood and agreed between these parties that it meant that The Ohio Oil Company, as the operator and the one required to advance all the funds necessary to develop and operate the jointly owned leases, [571] would have to look solely to the oil and gas produced, saved and marketed from the leases themselves for reimbursement for all expenditures made by it, and that under no circumstances would the **Troy-Sweet Grass** ever have to pay **Ohio** anything if the proceeds derived from the production of oil and gas from the jointly owned leases were insufficient. That is all that this clause meant. It was so explained to Mr. Jones and neither Mr. Hurley nor myself told him that under that provision there would be noth-

(Deposition of A. M. Gee.)

ing charged to Troy-Sweet Grass Oil Syndicate after the wells were put into operation, or anything to that effect.

I would like to say that the form of that particular clause was not one dictated or demanded by Mr. Jones. Our Company had made many operating agreements before. In those calling for reimbursement solely from oil produced, saved and marketed from the jointly owned leaseholds, we always wrote the clause in substantially this same language, that is, the same language as used in the Troy-Sweet Grass operating agreement. For example, we wrote this identical clause in an agreement with the Sunburst Oil and Gas Company, which was the company that drilled in the discovery well on June 5, 1922, in the vicinity of the lands here in question. That agreement was signed under date of June 16, 1922, although it had been in the course of negotiation for several days prior thereto. A photographic copy of the original operating agreement is attached hereto as Exhibit "A" to this Deposition.

On September 15, 1920, this defendant, The Ohio Oil Company, made and entered into an operating agreement with Robert M. Birck, of Chicago, whereby and wherein this same covenant was made and the language was the same. For example, the Birck contract says: "* * * but in no case shall the party of the first part be held or charged beyond the value of its

(Deposition of A. M. Gee.)

share or interest in the production or equipment from, in or upon said lands." Mr. F. E. Hurley signed for The Ohio Oil Company. Mr. John McFadyen witnessed the [572] signatures of Mr. Birck and Mr. Hurley. Mr. John McFadyen was the General Manager of The Ohio Oil Company in active charge of all its field operations in the Rocky Mountain region, including Montana. He lived in Casper, Wyoming, although he spent a lot of time in Montana and he supervised the original development of the lands here in question, as well as other lands in the Kevin-Sunburst Field. A photographic copy of the original agreement is attached hereto, as Exhibit "B." The original is available.

We also wrote this identical clause in an operating agreement with the Blackstone Petroleum Company, in Wyoming, under date of September 15, 1921, relative to the development and operation of jointly owned leases in Natrona County, Wyoming, wherein and whereby we also said, among other things, "* * * and in no case shall the party of the second part be finally held or charged beyond the value of its share or interest in the production or equipment from, in or upon said lands."

Other operating contracts and agreements could be cited in substantiation of this point.

Answer to Interrogatory No. 22:

Not to my recollection, but I call attention

(Deposition of A. M. Gee.)

to the fact that Mr. Sellery had done so and he had reported to Mr. Hurley and his associates, including myself, because that was all fully confirmed when we talked to Mr. Jones.

Answer to Interrogatory No. 23:

There were none.

Answer to Interrogatory No. 24:

Yes, sir.

Answer to Interrogatory No. 25:

The Benjamin Building, on or about June 10, 1922.

Answer to Interrogatory No. 26:

Yes, sir.

Answer to Interrogatory No. 27: [573]

He became a Vice-President on May 27, 1918, and a Director on May 23, 1912, and held these offices until his death.

Answer to Interrogatory No. 28:

Dead.

Answer to Interrogatory No. 29:

July 10, 1928, in Findlay, Ohio.

Answer to Interrogatory No. 30:

He had been ill for some time. It was common knowledge to many of us. I visited him at his home in Findlay a few weeks before his death. As an employee in the Company, I naturally heard about his death from com-

(Deposition of A. M. Gee.)

munications between offices. I did not attend his funeral but sent a message of condolence, flowers, read newspaper articles about him and resolutions by the Board of Directors, visited his widow in his home thereafter, and knew all about it in a very general way.

Answer to Interrogatory No. 31:

Yes, sir.

Answer to Interrogatory No. 32:

A leaser connected with the Land Department of the Casper Division Office, which had charge of the acquisition of lands for oil and gas purposes in the entire Rocky Mountain region, including Montana. He came with our Company prior to 1920 and remained with it in that capacity until his death.

Answer to Interrogatory No. 33:

Dead.

Answer to Interrogatory No. 34:

He died in El Paso, Texas, in February, 1927.

Answer to Interrogatory No. 35:

I personally attended his funeral.

Answer to Interrogatory No. 36:

Yes, sir. [574]

Answer to Interrogatory No. 37:

General Manager of the Casper Division, which covered all oil and gas operations of The

(Deposition of A. M. Gee.)

Ohio Oil Company in the Rocky Mountain region, including the State of Montana. This position he held from 1912 until his retirement June 1, 1941. In addition he became a Director of the Company on May 28, 1925, and held that position until he retired.

Answer to Interrogatory No. 38:

Dead.

Answer to Interrogatory No. 39:

He died in Los Angeles, California, April 26, 1943.

Answer to Interrogatory No. 40:

I was living here at the time of his death and our office received word from his home and also from members of our Los Angeles office about his death. I afterwards visited his widow in his home and saw news dispatches about his death.

Answer to Interrogatory No. 41:

Yes, sir.

Answer to Interrogatory No. 42:

He was then Cashier of the Casper Division, which covered all the Company's operations in the Rocky Mountain area, including Montana. As such he was responsible for the accounting procedure relative to all Company operations in his division. He went to Wyoming in December, 1919, as Cashier, and held that position until he left there in February, 1927.

(Deposition of A. M. Gee.)

Answer to Interrogatory No. 43:

Dead.

Answer to Interrogatory No. 44:

June 23, 1942, at Findlay, Ohio.

Answer to Interrogatory No. 45:

It just happens that I was with him the night he had a heart attack and I saw him pass away. I attended his funeral. [575]

Answers to Cross-Interrogatories:

Answer to Cross-Interrogatory No. 1:

(a) Director of The Ohio Oil Company.

(b) Casper, Wyoming, from June, 1920, to October, 1927; Tulsa, Oklahoma, from October, 1927, to July, 1932; and Findlay, Ohio, from July, 1932, to present date.

(c) All of my time within the above dates.

(d) At Casper I was General Attorney for the corporation. In Tulsa I was General Counsel for the Mid-Kansas Oil and Gas Company, a wholly-owned subsidiary, which later changed its name to Marathon Oil Company. I was also for a time Vice-President and Director of that subsidiary. I came to Findlay as General Counsel for The Ohio Oil Company and have been a Director since 1941.

Answer to Cross-Interrogatory No. 2:

(a) F. E. Hurley and A. M. Sellery, with the consent and approval of T. P. Jones.

(Deposition of A. M. Gee.)

(b) F. E. Hurley was a Vice-President of The Ohio Oil Company and also a Director. He was responsible to the officers and other Directors of the corporation for the general supervision and direction of all oil and gas business being conducted in the Rocky Mountain area. Hence, he was obliged to and did spend a great deal of time there and worked with all members of his organization. A. M. Sellery was one of several men employed to obtain leases and contracts for the company in connection with the general oil and gas business. His official residence was then at Casper, Wyoming, although at the time this contract was made and for some time thereafter he spent a considerable amount of his time in Shelby, Montana.

(c) Yes, sir.

Answer to Cross-Interrogatory No. 3:

(a) F. E. Hurley, A. M. Sellery, T. P. Jones, and Kenneth G. Luke. [576]

(b) Their positions are given fully in my answer to Cross-Interrogatory No. 2 (b).

Answer to Cross-Interrogatory No. 4:

(a) No, sir. However, it is my best recollection that I talked with some member of the law firm of Freeman, Thelen and Frary, of Great Falls, about a dispute that arose in 1925 over the interpretation of our operating agreement because under date of August 5, 1925, J. W. Freeman wrote our Mr. F. B. Firmin a

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letter, in which he outlined several points of dispute. Mr. Firmin was our Cashier at Casper, Wyoming, and as such he had supervision of the Company's accounting in the Rocky Mountain area. He was familiar with our operations in the Kevin-Sunburst Field. I conferred with Mr. Firmin about the disputes and assisted him in the preparation of a letter that he wrote the law firm, dated September 12, 1925. No claim was made then that we had no right to charge our joint interest owner with costs incurred "off the land itself," or that we had no right to charge them for the cost of operating the wells after they had been equipped and put on production. They were then disputing the expenses incurred by us for the construction or operation of a water plant; that we had no right to charge 10% overhead; or no right to charge any field auto expense; or to charge any part of the construction cost of a field camp used to develop and operate their leases along with other leases. They also contended that our drilling costs were too high; that we should have included in our accounting covering the price received for oil sold, a premium that was being offered in the field by some purchaser. It was my understanding that these matters were explained to the satisfaction of the law firm and the company officials. At least, I do not recall having heard anything more about it. Mr. Firmin conferred with Mr. Hurley about

(Deposition of A. M. Gee.)

these matters. Mr. Hurley consulted with me about them. [577]

Answer to Cross-Interrogatory No. 5:

No, sir. It was not my understanding of the provision referred to in this question that there would be a final accounting held between the Ohio and the other party to the agreement for the purpose of finally determining the items of expense in connection with the performance of the contract. Our operating agreement expressly called for the rendition of monthly statements and it was definitely understood between the parties when the agreement was made that the accounting was to be on a monthly basis and to follow the ordinary rules of accounting and of accounts stated, so that each party could tell at the end of each month the amount of the credit or debit balance that existed. If a credit balance was shown, we were expected to pay them their share of the net profits; if a debit balance, we were expected to carry it forward and rely upon future revenue to cover the same.

/s/ A. M. GEE.

State of Ohio,

County of Hancock—ss.

I, Viola Snyder, a Notary Public in and for Hancock County, State of Ohio, Do Hereby Certify:
That the witness, A. M. Gee, in the foregoing

deposition named, was, by me, duly sworn upon oath to testify the truth, the whole truth, and nothing but the truth, in said cause; that said Deposition was taken pursuant to Notice thereof, a copy of which is hereto attached, and the Direct Interrogatories and Cross-Interrogatories submitted by respective parties and hereto attached, on the 17th day of November, 1948, before me, a Notary Public, at my office in Hancock County Court House, Findlay, Ohio; that I stenographically took and transcribed and reduced to writing in [578] typewritten form and recorded the testimony of said witness, and when completed, said deposition was carefully read by said witness and by him stated to be correct and was by him subscribed in my presence.

I Do Further Certify that all objections made to the evidence presented have been noted upon said Deposition, and, at the time of taking said Deposition, no objections were made to the qualifications of the officer taking the Deposition, nor to the manner of taking it, nor to the conduct of any party, nor any other objection to the proceedings, except objections to the evidence presented, which said objections to evidence have been noted upon the Deposition, as aforesaid.

I Do Further Certify that all writing, documents and exhibits referred to by the witness and offered as a part of his testimony in response to the Interrogatories or Cross-Interrogatories, are hereto annexed and marked Exhibits "A" and "B."

I Do Further Certify that I am not a relative or employee or attorney or counsel of any of the par-

ties, nor am I a relative or employee of such attorneys or counsel, and I am not financially interested in said action, and that the said Deposition is a true record of the testimony given by the said witness, A. M. Gee.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal as a Notary Public this 17th day of November, A. D. 1948.

[Seal] /s/ VIOLA M. SNYDER,
Notary Public for Hancock County, Ohio, Residing
at Findlay, Ohio.

My commission expires February 1, 1949. [579]

EXHIBIT A

Operating Agreement

This Agreement, made and entered into this sixteenth day of June, A.D. 1922, by and between The Sunburst Oil and Gas Company, a Montana corporation, hereinafter called the party of the first part, and The Ohio Oil Company, an Ohio corporation, of Findlay, Ohio, hereinafter called the party of the second part,

Witnesseth:

That, Whereas, the said party of the first part in pursuance of a prior verbal agreement did on this date sell, assign, transfer and convey unto the said party of the second part, its successors and assigns, an undivided fifty (50%) per centum interest in and to certain oil and gas leases covering the following described premises, to wit:

East half ($E\frac{1}{2}$) of Section three (3) and North half ($N\frac{1}{2}$) of Section two (2), situate in Township thirty-five (35) north, Range two (2) west, M.M., and the Southeast quarter of the Southwest quarter ($SE\frac{1}{4}SW\frac{1}{4}$) and Southwest quarter of Southeast quarter ($SW\frac{1}{4}SE\frac{1}{4}$) of Section twenty-seven (27) and all of Section thirty-four (34) and West half ($W\frac{1}{2}$) and West half of East half ($W\frac{1}{2}E\frac{1}{2}$) of Section thirty-five (35), being situate in Township thirty-six (36) north, Range two (2) west, M.M., and all of said lands situate in Toole County, State of Montana, containing eighteen hundred and forty (1840) acres, more or less, and,

Whereas, the party of the first part is desirous of having the party of the second part develop and operate said premises for oil and gas purposes, and,

Whereas, the parties hereto desire to reduce to writing the terms and conditions of their understanding or agreement,

Now, Therefore, in consideration of the premises and of One Dollar by each of the parties hereto to the other in hand paid, the receipt of which is hereby acknowledged, and of the covenants and stipulations hereinafter contained, to be duly kept, paid and performed by the parties hereto, it is hereby mutually agreed:

I. The party of the second part shall have the control and management of the said lands and leases

and of the development and operation thereof for oil and gas purposes, including the marketing of the oil and gas produced.

II. As a part consideration for the assignment hereinabove mentioned, the party of the second part agrees that it will commence the drilling of a well at once, upon the above described lands and at such location as shall be selected by the party of the second part, and will continue said work in a diligent and workmanlike manner to such a depth as shall be deemed an adequate test of the oil and gas content of the first commercial oil sand underlying said structure and in compliance with the terms and conditions of the leases of the party of the first part.

III. In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and is consistent with good business management. It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part fifty (50%) per centum thereof. Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided fifty (50%) per centum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof, it being hereby understood and agreed that

all leases covering the lands herein described carry one-eighth ($\frac{1}{8}$) royalty to the lessor or lessors. The said party of the second part shall be reimbursed by the said party of the first part solely from the first party's proportion of the oil and gas produced and sold from said land. Application of proceeds derived from sale of said oil and gas will be [580] made to the credit of the first party's account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The party of the second part shall be entitled to and shall charge the party of the first part eight (8%) per centum interest upon all moneys so advanced for the development and operations upon said land for the account of the interest of the first party until the same shall have been paid out of the proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production provided however that the party of the first part shall always have the right to advance its proportion of the development and operation costs and expenses and thereby avoid said interest charges.

IV. The party of the second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expenses of developing and operating said lands and leases and will remit monthly to the party of the first part all proceeds of the oil and gas sold from the interest

of the first party over and above the amount necessary to reimburse the party of the second part for expenditures made by it for the account and interest of the party of the first part.

V. The party of the first part through its duly authorized agents or representatives shall at all times have access to the buildings, lands and property hereinabove described for the purpose of examining the operations thereon and the production therefrom, and at all reasonable times during business hours shall have the right to examine the books and records of the party of the second part insofar as they pertain to the operations conducted under this agreement.

VI. The party of the first part hereby gives and grants unto the party of the second part upon the considerations aforesaid the first right and option to purchase the interest of the first party in the lands and leases above described under and by virtue of the terms of this agreement should the first party at any time desire to dispose of its said interest, and the party of the second part grants unto the party of the first part a like option, should it desire to dispose of its interest.

VII. The party of the second part shall fully comply with all the terms and provisions contained in the leases hereinabove described unless and until surrendered unto the party of the first part, but shall have the right however, upon the payment of One Dollar to the party of the first part, to surrender the whole or any part of the above described

leases and lands embraced and included therein, and shall thereafter be relieved by said party of the first part from any further liability as to any such lands surrendered.

The terms and conditions of this agreement shall extend to and be binding upon the heirs, administrators, successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have caused this instrument to be executed the day and year first above written.

[Seal] THE SUNBURST OIL AND
 GAS COMPANY,

By /s/ C. R. STEVENSON,
President.

Attest:

/s/ WM. GEO. DAVIS,
Secretary,

Party of the First Part.

Witness:

/s/ A. M. GEE.

[Seal] THE OHIO OIL COMPANY,

By /s/ F. E. HURLEY,
Vice President,

Party of the Second Part.

Attest:

/s/ C. L. FLEMING,
Secretary.

Witness:

/s/ A. M. GEE,
/s/ PEARL WILLIAMSON. [581]

EXHIBIT B

Agreement

Memorandum of Agreement, Made and entered into this 15th day of September, A.D. 1920, by and between Robert M. Birck of Chicago, Illinois, party of the first part, and The Ohio Oil Company, a corporation of Findlay, Ohio, party of the second part,

Witnesseth:

For That Whereas, the party of the first part is the owner of a lease upon the North Half of the Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$) of Section 24, Township 10 North, Range 26 East of the Montana Principal Meridian, in the County of Musselshell and State of Montana, which lease is subject to a five percent (5%) net royalty to Frank Liess; and,

Whereas, the party of the first part has taken an option to purchase in fee the Northwest Quarter of the Northeast Quarter ($NW\frac{1}{4}NE\frac{1}{4}$) of Section 24, Township 10 North, Range 26 East of the Montana Principal Meridian, in the County of Musselshell and State of Montana; and,

Whereas, the said first party proposes to close his option on the said premises and then make a lease to The Ohio Oil Company at one-eighth ($\frac{1}{8}$)

royalty, reserving to himself, however, a twenty-five percent (25%) working interest in and to the same, which said lease is to be operated under the terms and conditions hereinafter set forth;

Now, Therefore, the party of the first part, for and in consideration of the sum of One Dollar (\$1.00) to him in hand paid by the party of the second part, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter set forth, agrees to assign, and does hereby assign unto the said party of the second part an undivided seventy-five percent (75%) interest in and to the two above described leases, and agrees to have the same operated under the following terms and conditions, to wit:

First: The party of the first part agrees that the party of the second part shall have the complete management and control of all of said property aforesaid, as well as the sale of the oil therefrom.

Second: It is understood by and between the parties hereto that the party of the first part has a contract with the Victory Oil Company, a Montana corporation, whereby he shall pay the said Victory Oil Company five percent (5%) royalty in the Northwest Quarter of the Northeast Quarter of Section 24, Township 10 North, Range 26 East of the Montana Principal Meridian, provided the first well on the Big Wall Structure is drilled on this said forty (40) acres. In case said first well is drilled on the forty (40) acres described, then the party of the second part assumes and agrees to pay to the aforesaid Victory Oil Company the said five

percent (5%) royalty, which said first party has obligated himself to pay.

Third: The party of the second part agrees to furnish unto the party of the first part a monthly statement covering all investment and expense, of operating said property, together with a monthly statement of the amount of the production of oil and gas from said premises.

Fourth: The party of the second part agrees that a well shall be commenced upon said structure of which the above described lands are a part at some point to be selected and designated by it within sixty (60) days from the date hereof, and the drilling of the same to continue with all due diligence.

Fifth: In the event that the above described well, when completed, shall be a commercial oil well, the party of the second part agrees to diligently continue the work of developing and operating said lands for oil and gas purposes as fully and as rapidly as is consistent with good business management.

Sixth: The party of the second part will pay all expenses and costs [582] of developing and operating said lands for oil and gas purposes as herein provided and shall charge said party of the first part with twenty-five percent (25%) thereof. Said party of the second part shall market all of the oil and gas produced from said lands and account to the party of the first part for the undivided twenty-five percent (25%) of the proceeds thereof at the prevailing market price at the wells for said oil and gas, after deducting all royalty oil and gas or the proceeds thereof. The said party of the second part

shall be reimbursed by the said party of the first part from the first party's proportion of the oil and gas produced and sold from said lands. Application from the proceeds from sales of said oil and gas will be made to the credit of the first party's account on the first day of the month following that in which said oil and gas is sold, but in no case shall the party of the first part be finally held or charged beyond the value of its share or interest in the production and equipment from, in and upon said lands. The party of the second part shall charge the party of the first part eight percent (8%) interest on all moneys so advanced for the development and operation of said lands for the account of the interest of the party of the first part, until the same shall have been paid out of the proceeds of the first party's proportion of the oil and gas produced and sold as herein provided.

This agreement shall extend to and be binding upon the respective parties hereto and their successors, administrators and assigns.

In Witness Whereof, the parties hereto have caused this instrument to be executed the day and year first hereinabove written.

/s/ ROBT. M. BIRCK.

Witness:

/s/ JNO. McFADYEN.

THE OHIO OIL COMPANY,

By /s/ F. E. HURLEY,

Vice-President.

Witness:

/s/ JNO. McFADYEN. [583]

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION ON
WRITTEN INTERROGATORIES

To E. J. McCabe, Attorney for Plaintiffs, Montana
Power Building, Great Falls, Montana.

Please Take Notice that the attached Interrogatories will be propounded on defendant's behalf to A. M. Gee, whose address is c/o The Ohio Oil Company, Findlay, Ohio, at the taking of his Deposition before Viola Snyder, a Notary Public, whose address is Hancock County Court House, Findlay, Ohio.

Any Cross-Interrogatories or objections must be served upon defendant within ten (10) days from date of service of this Notice.

Dated at Shelby, Montana, this 16th day of October, A.D. 1948.

/s/ W. H. EVERETT,

/s/ LOUIS P. DONOVAN,

Attorneys for Defendant.

[Title of District Court and Cause.]

INTERROGATORIES TO BE PROPOUNDED
ON DEFENDANT'S BEHALF TO A. M.
GEE,

Whose Address Is c/o The Ohio Oil Company, at
Findlay, Ohio, by Viola Snyder, Notary Public,
Whose Address Is Hancock County Court House,
Findlay, Ohio.

1. State your name and address.
2. What is your occupation or profession?
3. Are you employed by The Ohio Oil Company,
defendant herein, as one of its attorneys at the
present time?
4. How long have you been so employed?
5. Were you employed by The Ohio Oil Com-
pany as an attorney at law in the month of June,
1922?
6. There is attached to the Complaint in this
action and marked Exhibit "A" thereof, a copy of
an Operating Agreement made and entered into the
15th day of June, 1922, by and between Troy Sweet
Grass Oil Syndicate, a common law trust, of Shelby,
Montana, as first party, and The Ohio Oil Company,
a corporation, of Findlay, Ohio, as party of the sec-
ond part. Please state whether you had anything
to do with the preparation of the [585] Operating
Agreement referred to, or the execution of same by
the parties thereto.
7. If you answer the foregoing question in the
affirmative, please state fully what connection you
had with:

(a) The preparation of the said Operating Agreement.

(b) What other persons were present.

(c) Where the agreement was prepared.

(d) Whether, after same was first prepared, any changes were made therein at the instance of any of the parties thereto.

(e) If you state that a change or changes were made in the language of the operating agreement after it was first prepared, state at whose instance the change was made and state fully what was said in regard to same, and by whom the request or statements were made.

8. Were you personally present when the agreement was executed by the respective parties thereto?

9. If you answer the foregoing question in the affirmative, please state:

(a) Where the agreement was executed.

(b) Who was present.

(c) Any explanations or discussions between the parties, or their representatives, in regard to the terms of the Operating Agreement or the interpretation of the language thereof, and give the substances of the discussion.

10. Were you present when the terms of the Operating Agreement were negotiated and discussed by the parties thereto?

11. If there was any such negotiation or discussion, please state where the same took place and the date and hour that same took place, and [586] the substance of what was said.

12. There is on file in this case a Deposition given by Mr. T. P. Jones, in which Mr. Jones testified that Mr. Hurley and Mr. Gee came to the office of Troy Sweet Grass Oil Syndicate, in Shelby, Montana, on the morning of June 15, 1922, and asked him if he could and would make an Operating Agreement on some land held by Mr. Jones' Company (page 12, Jones Deposition). Please state if the foregoing statement by Mr. Jones is correct, and if not correct, please make a full statement of the transaction that actually occurred.

13. Mr. Jones testified further (page 13, Jones Deposition): "I told them that I would enter into an agreement with them but not where any expenses would be charged to this land off of the lease, of Findlay, Ohio, or any place else, off of that lease, and so then after a conversation quite a while Mr. Hurley, or one of them, spoke up and said, well the charges wouldn't be in excess of probably ten per cent, and I told them 'all right, gentlemen, if that is all it will be, I will give you 45% and you can take 55%, and you can pay the expenses and put that into a lease and we can make an agreement,' and Mr. Gee said he would write up that kind of an agreement. I said 'There is a typewriter here and paper.' He said 'I have a typewriter right over here and I will go over and write it,' which he did, and when he came back, he had an operating agreement written up in duplicate. I think it was triplicate."

Please state whether any such conversation took place in your presence.

14. After the proposed form of Operating Agreement was prepared and submitted to Mr. T. P. Jones, did he make any objection to the language of it, and if so, what objection did he make?

15. Did you at that time and place say to Mr. Jones, "I will go and rewrite it and include it in there," meaning a provision to the effect [587] that The Ohio Oil Company would pay all of the expenses outside the boundaries of the lease, or anything to that effect?

16. Did you thereafter go and rewrite the Operating Agreement and return again with the Operating Agreement, as rewritten?

17. Did you on your return with the Operating Agreement, as rewritten, point out to Mr. Jones a certain paragraph and say to him that that paragraph covered the objections that he had, and that there would be no charges against the Troy Sweet Grass Oil Syndicate except what was done on their ground? (Jones Deposition, p. 19.)

18. Was any such statement made by Mr. F. E. Hurley or by any other representative of The Ohio Oil Company in your presence?

19. Did you or any other representative of The Ohio Oil Company at or before the Operating Agreement dated June 15, 1922, and a copy of which is attached to the Complaint herein, was executed, state or represent to Mr. T. P. Jones that under the terms of the agreement only expenses incurred on the lease in the drilling of wells and putting them into production, would be charged against Troy Sweet Grass Oil Syndicate and that there

would be no part of the expenses charged against Troy Sweet Grass Oil Syndicate after the wells were drilled and put into production? (Jones Deposition, pp. 51-52.)

20. Did you or any other representative of The Ohio Oil Company state to Mr. Jones in connection with the Operating Agreement above mentioned, that no part of the cost of operation, pumping the wells, would be charged to Troy Sweet Grass Oil Company or its successors? (Jones Deposition, pp. 52-54.) [588]

21. Your attention is called to the following provision in paragraph III of the Operating Agreement, to wit:

“But in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands”;

Did you or Mr. Hurley, in your presence, point out the above provision to Mr. Jones and say to him that under the above provision there would be nothing charged to Troy Sweet Grass Oil Syndicate after the wells were put into operation (Jones Deposition, p. 54), or anything to that effect?

22. Had you or Mr. Hurley, in your presence, discussed with Mr. T. P. Jones the terms of the proposed Operating Agreement at any time previous to June 15, 1922 (the date on which it was executed)?

23. If you answer the foregoing question in the affirmative, state when the discussions took place,

and where the discussions took place, and who was present.

24. Did The Ohio Oil Company have an office in Shelby, Montana, on June 15, 1922?

25. If you answer the foregoing question in the affirmative, please state where the office was located, and about the date that it was opened.

26. Were you personally acquainted with Mr. F. E. Hurley in his lifetime?

27. State what office, if any, Mr. F. E. Hurley held with The Ohio Oil Company in June, 1922, and approximately how long he held such office.

28. State whether Mr. F. E. Hurley is living or dead at the present date.

29. If you state that Mr. Hurley is deceased at the present date, state if you can, the time and place of his death. [589]

30. State fully how, or in what manner, you became acquainted with the fact as to the time and place of Mr. F. E. Hurley's death.

31. Did you know A. M. Sellery in his lifetime?

32. If you answer the foregoing question in the affirmative, state what position, if any, A. M. Sellery held with The Ohio Oil Company in June, 1922, and approximately how long he held such office.

33. State whether Mr. A. M. Sellery is living or dead at the present date.

34. If you state that Mr. Sellery is deceased at the present date, state if you can, the time and place of his death.

35. State fully how, or in what manner, you be-

came acquainted with the fact as to the time and place of Mr. A. M. Sellery's death.

36. Did you know Mr. John McFadyen in his lifetime?

37. If you answer the foregoing question in the affirmative, state what position, if any, John McFadyen held with The Ohio Oil Company in June, 1922, and approximately how long he held such office.

38. State whether Mr. John McFadyen is living or dead at the present date.

39. If you state that Mr. McFadyen is deceased at the present date, state if you can, the time and place of his death.

40. State fully how, or in what manner, you became acquainted with the fact as to the time and place of Mr. John McFadyen's death. [590]

41. Did you know Mr. F. B. Firmin in his lifetime?

42. If you answer the foregoing question in the affirmative, state what position, if any, F. B. Firmin held with The Ohio Oil Company in June, 1922, and approximately how long he held such office.

43. State whether Mr. F. B. Firmin is living or dead at the present date.

44. If you state that Mr. Firmin is deceased at the present date, state if you can, the time and place of his death.

45. State fully how, or in what manner, you became acquainted with the fact as to the time and place of Mr. F. B. Firmin's death.

Dated at Shelby, Montana, this 16th day of October, A.D. 1948.

/s/ W. H. EVERETT,

/s/ LOUIS P. DONOVAN,
Attorneys for Defendant.

[Title of District Court and Cause.]

CROSS-INTERROGATORIES TO BE PRO-
POUNDED ON PLAINTIFFS' BEHALF
TO A. M. GEE,

Whose Address Is c/o The Ohio Oil Company, at Findlay, Ohio, by Viola Snyder, Notary Public, Whose Address Is Hancock County Court House, Findlay, Ohio.

1. If you answer defendant's direct interrogatories numbers 3 and 4 substantially to the effect that you are employed as one of the attorneys for the Ohio Oil Company at the present time, and state the length of time that you have been so employed, please state:

a. In what other capacities besides that of attorney you have been employed by the Ohio Oil Company.

b. The names of the cities and towns where you have been located during the period of your employment.

c. The approximate period of time spent in your employment in the various places.

d. The general nature and character of your employment and duties while employed in the

various cities and towns in which you were located during the term of your employment.

2. If you answer defendant's direct interrogatory number 6 in the affirmative, please state:

a. The name or names of the person or persons who requested you to become connected with the preparation or execution of the Operating Agreement.

b. The office or position held by such person or persons with the Ohio Oil Company at the time.

c. If you were acting as attorney for the Ohio Oil Company at the time. [593]

3. If you answer defendant's direct interrogatory number 7 substantially, among other things, to the effect that other persons were present, please state:

a. The name or names of the person or persons present.

b. What position or positions with the Ohio Oil Company were held, at the time, by such persons, respectively.

4. If you answer defendant's direct interrogatory number 9 substantially, among other things, to the effect that there were explanations or discussions in regard to the terms of the Operating Agreement or the interpretation of the language thereof, please state:

a. Whether, subsequent to the execution of the Operating Agreement, you ever discussed with any person or persons the substance of

the explanations or discussions in regard to the terms of the Operating Agreement or the interpretation of the language thereof, and if you answer that you did have such discussions, state the approximate dates, the names of the city or town in which you had any such discussion, and the names of the persons with whom any discussion was had, and if such person or persons were connected with the Ohio Oil Company in an official position or employed by said company, please state the official position held and the capacity in which such person was employed.

5. In defendant's direct interrogatory number 21, your attention has been directed to a quoted provision from paragraph III of the Operating Agreement. State whether or not, at the time this provision was inserted in the Operating Agreement it was your understanding of the provision that there would be a final accounting held between the Ohio Oil Company and the other party to the Operating Agreement for the purpose of finally determining the items of expense connected with the performance of the Operating Agreement by the Ohio Oil Company that was to be finally charged against the [594] Party of the First Part or against the Troy-Sweet Grass Oil Syndicate and you are requested to answer this interrogatory yes or no.

Dated this 28th day of October, 1948.

E. J. McCABE,

Attorney for Plaintiffs.

[Endorsed]: Filed December 23, 1949. [595]

[Title of District Court and Cause.]

DEPOSITION OF KENNETH G. LUKE

Be it remembered that pursuant to stipulation of the above-named plaintiffs and defendant, a duly certified copy of which stipulation is hereunto annexed, and on the 18th day of June, 1948, at Spokane, State of Washington, before me George Stewart, a Notary Public in and for the State of Washington, duly appeared Kenneth G. Luke, a witness produced on behalf of the defendant in the above-entitled action now pending in the above-entitled court, who, being first by me duly sworn, was then and there examined and interrogated by Louis P. Donovan, of counsel for the defendant, the plaintiffs being represented by their attorney, E. J. McCabe, and testified as follows: [598]

KENNETH G. LUKE

being first duly sworn to tell the truth, the whole truth and nothing but the truth in the above-entitled cause, was examined on behalf of the Defendant, and testified as follows:

Direct Examination

By Mr. Donovan:

Q. Will you state your name.

A. Kenneth G. Luke.

Q. And how old are you, Mr. Luke?

A. Sixty-four.

Q. And your present occupation and residence?

A. My residence is 514 First Avenue, West. My

(Deposition of Kenneth G. Luke.)

occupation is, I think I will say a public accountant.

Q. You gave the street number. That is Spokane, Washington?

A. Yes, Ridpath Hotel, Spokane, Washington.

Q. And how long have you lived in Spokane, Mr. Luke?

A. I have lived at the Ridpath Hotel for twenty years or better.

Q. That is enough. Prior to coming to Spokane, did you live in Montana? A. I did.

Q. And where were you living in 1921 and '22?

A. I was in Shelby myself most of the time. I think my family were in Kalispell in—I don't know when I moved here; I think it was '21 or '22. Anyway, I lived in Kalispell for a time before coming here.

Q. For the purpose of fixing the time, the Campbell discovery well was drilled in, I believe, March, 1922. Campbell had been drilling it for practically a year prior [599] to that, I believe.

A. Well, I think I could say that personally I was living at the Rainbow Hotel in Shelby. I think perhaps I wasn't at the Rainbow Hotel at that time because I think I helped Tom start that hotel after that. I was in Shelby, Montana.

Q. And attached to the complaint in this action as an exhibit is a copy of an operating agreement dated June 15, 1922, between Troy-Sweet Grass Oil Syndicate of Shelby, Montana, as party of the first part, and Ohio Oil Company as party of the

(Deposition of Kenneth G. Luke.)

second part, and that appears to be executed on behalf of the Troy-Sweet Grass Oil Syndicate by T. P. Jones, President, and Kenneth G. Luke, Secretary. Are you the Kenneth G. Luke, Secretary of Troy-Sweet Grass? A. I am.

Q. In 1922? A. I am.

Q. And you were acquainted with T. P. Jones?

A. I was.

Q. Do you recall the time and place of the execution of this operating agreement that I have just referred to?

A. On my part? The execution on my part?

Q. Yes. Well, the execution of all of the parties if you saw it executed by the other parties?

A. I don't think I saw it executed by the other parties. I think they had already signed the papers when they came to me for signature, and it was in the office of the Troy-Sweet Grass Oil Syndicate, which had been my former office, preceding the organization of that syndicate, [600] over the First National Bank Building on the north side of the tracks in Shelby, Montana. As I remember it, it was in the forenoon.

Q. On the date that the instrument bears?

A. I would say so.

Q. Do you recall the representatives or officers of the Ohio Oil Company who signed that instrument?

A. I do. Mr. Hurley of Findlay, Ohio, and Mr. Sellery.

Q. Art Sellery? A. Yes.

(Deposition of Kenneth G. Luke.)

Q. Were you acquainted with either of these gentlemen prior to the date of the execution of this operating agreement?

A. I knew Mr. Sellery, I believe. I think I had met him previous to that. I don't remember if I knew Mr. Hurley or not.

Q. Do you recall who prepared the operating agreement or anything about that part of the transaction? A. I do not.

Q. Well, how did it come to you, Mr. Luke?

A. As I remember it, Mr. Hurley and Mr. Jones and Mr. Sellery came to the office over the First National Bank Building in Shelby and laid the agreement before me and asked me to sign it as Secretary and attach the seal of the syndicate to the agreement.

Q. Do you recall whether they came there together?

A. I think they did. I think they all came up together. It was upstairs.

Q. And are we to understand that the papers were all prepared at that time?

A. As I remember it, they were all prepared and they just [601] simply came up there and asked me to sign.

Q. And was there any discussion in your presence about the terms under discussion, either between you and the representatives of the Ohio Oil Company or between Mr. T. P. Jones and the representatives of the Ohio Oil Company?

(Deposition of Kenneth G. Luke.)

A. Not there, no. I don't think so. I don't remember any such.

Q. Did you examine the operating agreement yourself?

A. Well, I think I just glanced over it. They were in a hurry, and as I remember, Mr. Jones told me that it was fully understood and that it was all right, "Go ahead and sign it and put the seal on it."

Q. Before you got through reading it?

A. Yes, before I had read it through. In fact, I don't know as I read it very thoroughly at the time.

Q. Well, it is a document I think of about three pages.

A. I have seen it since.

Q. And about how long after those gentlemen came to the office was it when the execution was completed by signatures of all the parties?

A. Oh, I would say within—As I remember it, it was all signed by them, and it took not over ten minutes for me to sign it and attach the seal of the syndicate. I don't think they signed it in my presence. I don't remember that. I think they had signed it.

Q. And this took place at the office of the Troy-Sweet Grass Oil Company?

A. That is right.

Q. Was that on the second floor of the First National Bank Building? [602]

A. That is right.

Q. Or the building usually called the First National Bank in Shelby, Montana?

(Deposition of Kenneth G. Luke.)

A. That is right.

Q. And that is on the north side of the Great Northern tracks? A. That is right.

Q. Have you been connected with the Troy-Sweet Grass Oil Syndicate for some time?

A. I had been one of the three organizers of it.

Q. And were you also actively connected with its business affairs, too?

A. I had been very active in the business affairs of it up until the time that Mr. Jones came into the picture. Probably I drew the trust agreement myself. Mr. I. W. Hansen of Kalispell, and it seems to me, it was H. C. Stapleton was the other member of the three that signed the trust agreement at the time, as I remember it.

Q. Were you instrumental in obtaining leases for the Troy-Sweet Grass Oil Company?

A. I think I acquired all of the leases of the Troy-Sweet Grass Oil Company.

Q. You were acquainted in Toole County and had lived there for quite a number of years?

A. That is right.

Q. And knew most of the landowners in the area of the Kevin-Sunburst field?

A. That is right.

Q. Do you recall how long you remained an officer of Troy-Sweet Grass Oil Syndicate after June 15, 1922, which [603] was the date of the operating agreement?

A. Yes, the operating agreement was dated June 15, 1922, between the Troy-Sweet Grass and

(Deposition of Kenneth G. Luke.)

the Ohio Oil, and after that sometime, I don't know how long, the corporation was formed known as the Potlatch Oil and Refining Company. Anyway, I remained with the Troy-Sweet Grass up to that time and I don't know how long after the organization of the Potlatch Oil and Refining Company. That is a long time ago.

Q. The complaint in this action alleges, the complaint of the Potlatch Oil and Refining Company and Inland Empire Oil and Gas Syndicate, alleges in Paragraph IX of the complaint that "On the 18th day of August, A.D. 1923, the aforesaid Troy-Sweet Grass Oil Syndicate assigned and set over and transferred unto the plaintiff, Potlatch Oil and Refining Company, all of its remaining interest of the Troy-Sweet Grass Oil Syndicate aforesaid in the lands and leases embraced in the operating agreement." According to your recollection, would you say that date is correct or probably correct?

A. Oh, I presume it is. I presume it is right.

Q. And I believe that that assignment shows yourself, Kenneth Luke, as executing it as Secretary, does it not?

Mr. McCabe: I might have a certified copy of that.

Q. (By Mr. Donovan): It appears that you did not sign this. It is signed by J. A. Harsh, Secretary.

A. Well, I had left prior to that time, then.

Q. Does that refresh your mind at all as to about the time your official connection with Troy-Sweet Grass terminated?

(Deposition of Kenneth G. Luke.)

A. Yes. I seem to recollect that I was—I am not sure. I [604] wouldn't know. It seems to me I was Secretary of the Potlatch Oil and Refining Company when it was first organized, for a short time. I may be absolutely wrong. This was made on the 18th of August, 1923. And the operating agreement was made on June 15, 1922, so I would say possibly a year after the execution of the agreement, a year or thereabouts.

Q. Do you recall how soon after the execution of this operating agreement with the Ohio Oil Company by Troy-Sweet Grass Oil Syndicate that the Ohio Oil Company commenced development upon the Oil Company's properties involved in the operating agreement?

A. I would say within three or four months. They started on the west end of what is known as the Israel Sindon tract, which I believe was the north half of Section 1-35-2, I believe.

Q. Township Thirty-five North, Range Two West?

A. Yes.

Q. And were you acquainted with the tract of land which had been known as the Irving H. Baker lease or the Ohio lease?

A. Yes, I drew the lease on it.

Q. Were you instrumental in obtaining that lease?

A. Yes, sir, very much.

Q. That lease, I believe, was taken direct to the Potlatch Oil and Refining Company?

A. It was taken direct to Troy-Sweet Grass.

(Deposition of Kenneth G. Luke.)

Q. That lease became an important producer, did it not? A. Yes, it did.

Q. Was that lease in production for some time before you severed your connection with Troy-Sweet Grass Oil Syndicate? [605]

A. I don't think it was. I don't remember whether they had started their first well on it or not, but offhand I would say "No." They might have drilled the first well. As I remember, the first well was a small well. Of course, I was in the field. I was well acquainted with it. Whether or not I was still with the Troy-Sweet Grass when they started operations on the Baker lease, I wouldn't remember,

Q. In this case, Mr. Luke, the plaintiffs have heretofore taken the deposition of T. P. Jones, and Mr. Jones states that the Baker lease was drilled, he thought, in late June or the first of July, something like that, in 1922. Of course, that is a matter of record. Does that refresh your mind at all?

A. Well, as I remember it, the first well the Ohio Oil Company drilled was the Sindon well—I may be wrong—in Section 1. Yes. That would take them at least—The operating agreement is June 15, 1922. I don't know how soon after that they drilled the Sindon well, but it would take them at least thirty days to drill the Sindon well—at that time, in those days of operation—or more.

Q. Well, is it a fact that very shortly after the operating agreement was made that the Ohio proceeded with development? A. Oh, yes.

(Deposition of Kenneth G. Luke.)

Q. Of the leases? A. Yes.

Q. During the time that you were Secretary or Trustee of the Troy-Sweet Grass Oil Syndicate, were there any arguments [606] or disputes about the charges made by the Ohio interests to Troy-Sweet Grass Oil Syndicate, any arguments or disputes with the Ohio Oil Company about its charges made against Troy-Sweet Grass Oil Company?

A. I would say no, none.

Q. And as I understood your testimony a little while ago, that on the morning of the execution of this operating agreement, after Mr. Hurley and Mr. Sellery and Mr. Jones came to the Troy-Sweet Grass office, there was no discussion in that office before the execution of the contract?

A. No, I would say not.

Q. Those three men whom I have just named, Mr. T. P. Jones, Mr. Hurley of the Ohio and Mr. Sellery of the Ohio, came there together, according to your recollection?

A. As I remember it, yes, sir.

Q. And they had the operating agreement with them fully prepared?

A. That is as I remember it, Mr. Donovan.

Q. And merely asked you to execute it as Secretary of the Troy-Sweet Grass Oil Syndicate and attach the seal? A. That is right.

Q. And that you did? A. I did.

Q. And that was merely a matter of probably ten minutes or twenty minutes after they came to the office?

(Deposition of Kenneth G. Luke.)

A. That is it. I would say not over twenty minutes.

Q. And so far as you recall, during the period of time that you were connected with Troy-Sweet Grass Oil Syndicate, Troy-Sweet Grass Oil Syndicate had no complaint against [607] the Ohio Oil Company because of its operations under the operating agreement or charges made under the operating agreement?

Mr. McCabe: Now, just a minute. To that the plaintiffs object on the ground it calls for a conclusion of the witness and is incompetent, irrelevant and immaterial, and no proper foundation has been laid for the admission of such evidence.

Q. (By Mr. Donovan): Will you answer that, Mr. Luke?

A. I don't remember any controversy existing up to the time I left.

Q. And state, if you can, whether during that period of time up until you severed your connection with Troy-Sweet Grass Oil Syndicate, whether the operations of the Ohio Oil Company under its operating agreement and charges made under it were entirely satisfactory.

Mr. McCabe: Just a minute. To which we object on the ground it calls for a conclusion of the witness and no proper foundation has been laid for the admission of the testimony, and it is wholly incompetent, irrelevant and immaterial.

Mr. Donovan: I am limiting this to the time

(Deposition of Kenneth G. Luke.)

when you were still the secretary of the Troy-Sweet Grass Oil Syndicate.

Mr. McCabe: I renew the objection.

A. What was the question, please?

(Question read.)

A. As far as I know.

Q. (By Mr. Donovan): Well, will you complete that. You mean as far as you know they were? [608]

A. As far as I know they were, yes.

Mr. Donovan: I think you may cross-examine, Mr. McCabe.

Mr. McCabe: No cross-examination.

Mr. Donovan: By agreement, the further hearing of this deposition will be adjourned until Tuesday at 1:00 o'clock to sign the deposition.

/s/ KENNETH G. LUKE,

Signature of Witness. [609]

Certificate of Notary Public

State of Washington,
County of Spokane—ss.

I, Geo. J. Stewart, a Notary Public in and for the State of Washington, do hereby certify that the witness, Kenneth G. Luke, in the foregoing deposition named, was by me duly sworn upon oath to testify the truth, the whole truth and nothing but the truth in said cause; that said deposition was taken pursuant to stipulation, a duly certified copy of which stipulation is hereunto annexed and

hereby referred to, on the 18th day of June, 1948, between the hours of 10:00 o'clock a.m. of said day and the hour of 1:00 o'clock p.m. of the 22nd day of June, 1948; that I stenographically took and transcribed and reduced to writing in typewritten form and recorded the testimony of said witness, and when completed said deposition was carefully read by said witness and by him stated to be correct and was by him subscribed in my presence.

I do hereby further certify that all objections made to the evidence presented have been noted upon said deposition, and, at the time of the taking of said deposition, no objections were made to the qualifications of the officer taking the deposition nor to the manner of taking it nor to the conduct of any party nor any other objection to the proceedings, excepting objections to the evidence presented, which said objections to evidence have been noted upon the deposition as aforesaid.

I do hereby further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorneys, or counsel, and I am not financially interested in said action.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal as a Notary Public this 22nd day of June, 1948.

[Seal] /s/ GEO. J. STEWART,
Notary Public for the State of Washington, Resid-
ing at Spokane, Washington.

My Commission expires Oct. 19, 1950. [610]

[Title of District Court and Cause.]

STIPULATION FOR TAKING DEPOSITION
OF KENNETH G. LUKE

It is hereby stipulated and agreed by and between the above-named plaintiffs and defendant, through the undersigned attorneys of record for said respective parties, as follows, to wit:

1. That the deposition of Kenneth G. Luke, a resident of Spokane, Washington, may be taken upon oral examination as a witness on behalf of the defendant for use as evidence in the above-entitled action. Said Deposition is to be taken at Spokane, Washington, before George J. Stewart, a Notary Public for the State of Washington, at the Court Room of Department 2, Spokane County Court House, West 1116 Broadway, commencing at the hour of 10:00 o'clock a.m., on June 18, 1948, and continuing until said Deposition is completed.

2. It is further stipulated and agreed that the right of cross-examination of said witness is expressly reserved to the above-named plaintiffs and all objection as to the relevancy, materiality and competency of the testimony of the said Kenneth G. Luke are hereby expressly reserved to the parties hereto; and when so taken, the said Deposition may be used on the trial of said action subject to the same objections (except as to the form of

the questions) as if the said witness were personally present in court and testifying therein.

Dated this 3rd day of May, A.D. 1948.

/s/ E. J. McCABE,
Attorney for Plaintiffs.

/s/ W. H. EVERETT,
LOUIS P. DONOVAN,
Attorneys for Defendant.

[Endorsed]: Filed December 23, 1949. [611]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The Plaintiffs in the above-entitled action set forth the following points on which they intend to rely on their appeal to the United States Circuit Court on Appeals for the Ninth Circuit.

The Trial Court erred as follows:

1. In finding that the pertinent portions of the agreement dated June 15, 1922, between Plaintiffs' predecessor in interest, Troy-Sweet Grass Oil Syndicate, and The Ohio Oil Company is plain and free from ambiguity and is clear, explicit and unequivocal in its language, terms and provisions and that Defendant, The Ohio Oil Company, at all times has fully complied with each and all of the obligations therein imposed upon it.

2. In finding that T. P. Jones was one of the persons who prepared the agreement of June 15, 1922, and was engaged directly or indirectly in the production and development of oil and gas leases and lands and was experienced in that business and knew or should have known and understood the meaning of the plain language used and contained in said agreement and that said agreement was entered into at arm's length.

3. In finding that at no time during the period subsequent [613] to Ohio entering into possession of the property, and prior to the time that Troy assigned to Inland and Potlatch, were any objections ever made by Troy to Ohio with reference to the accounting which included the same items as subsequent statements of account made to Inland and Potlatch contained.

4. In finding that payments made by Ohio were received and accepted by Plaintiffs during all of said period well knowing that Ohio had repeatedly refused to make any changes in its charges such as Plaintiffs proposed and Plaintiffs knew or should have known that the payments were made by Ohio in full payment of the respective items covered in its respective monthly statements.

5. In making and declaring as a conclusion of law that the agreement of June 15, 1922, between Troy and Ohio is clear and explicit does not involve an absurdity and that the agreement must be ascertained from the agreement alone and it may not be explained or interpreted by parol evidence

or reference to matters outside of and not recited in this written agreement.

6. In making and declaring as a conclusion of law that T. P. Jones' testimony as to the alleged remarks of John McFadyen, deceased manager of Ohio, is not admissible for any purpose that no foundation for such testimony has been made and no injustice will be done by excluding it and that no imperfection of the writing is put in issue.

7. In making and declaring as a conclusion of law that Ohio, through a continuous and unvarying course of conduct on its part, under the plain requirements of the written agreement since the execution thereof and at all times thereafter during the period questioned in this suit in all things complied with the clear term and provisions of the written agreement of June 15, 1922.

8. In making and declaring as a conclusion of law that laches in asserting their claims bar plaintiffs from any recovery [614] in the action.

9. In making and declaring as a conclusion of law that the statutes of limitation of the State of Montana bar plaintiffs from any recovery in the action.

10. In making and declaring as a conclusion of law that Ohio is not a trustee for plaintiffs.

11. In making and declaring as a conclusion of law that the monthly statements of account furnished by Ohio to Troy, Potlatch and Inland and

the acceptance and retention of the money paid to them respectively by Ohio with knowledge that Ohio repeatedly refused to make any changes in its accounting and made each payment in full settlement of each statement constitutes an account stated between Ohio and plaintiff and may not be challenged by them.

12. In making and declaring as a conclusion of law that plaintiffs recover nothing and that defendant do have judgment in its favor and recover from plaintiffs all defendant's costs expended in the action.

13. In rendering judgment in favor of defendant and against the plaintiffs and adjudging recovery of defendant's costs from plaintiffs in the action.

Dated this 5th day of April, 1951.

/s/ E. J. McCABE,

/s/ E. J. McCABE, JR.,

Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1951. [615]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL

Upon application of the above-named Plaintiffs and Appellants in the above-entitled cause, by their attorney of record, and for good cause shown, it is by the Court, this 4th day of May, 1951,

Ordered that the time for filing and docketing in the Circuit Court of Appeals of the Ninth Circuit the record on appeal in this cause, be, and the same is hereby extended to and including June 5, 1951.

/s/ W. D. MURRAY,
Judge.

[Endorsed]: Filed May 4, 1951.

Entered and noted May 5, 1951. [625]

[Title of District Court and Cause.]

ORDER TO TRANSMIT ORIGINAL PAPERS
TO APPELLATE COURT

Upon motion of the above-named Plaintiffs for an Order to Transmit certain original Exhibits hereinafter specified to the Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause and the court having been duly advised;

It is hereby ordered that the Clerk of this court be, and he hereby is, directed to transmit in physi-

cal form and without copying same in the record on appeal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit the following original papers and exhibits: Exhibits "A," "B," "C," "D" and "E" heretofore offered and received in evidence on behalf of the Plaintiffs at the trial of the above-entitled cause.

And it is further Ordered, that the above-enumerated papers and exhibits shall be received by the clerk of the aforesaid Circuit Court of Appeals and held by him during the pendency of the appeal herein for the use of the court and counsel without having the same printed as a part of the printed transcript of record on appeal. And it is further

Ordered, that after the termination of the proceedings on appeal, the clerk of the aforementioned Circuit Court of Appeals [627] shall return the said papers and exhibits to the Clerk of this Court.

Done this 16th day of May, 1951.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed May 16, 1951. [628]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND
DOCKET RECORD ON APPEAL

Upon application by Plaintiffs and cause shown:

It is hereby ordered that the time for Plaintiffs to file their Record on Appeal in this action and docket same be, and the same hereby is, extended to and including the 24th day of June, 1951.

Done this 4th day of June, 1951.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered June 4, [632]
1951.

[Title of District Court and Cause.]

NOTICE TO PRODUCE WRITINGS FOR USE
BY PLAINTIFFS AS EVIDENCE

To the above-named Defendant, The Ohio Oil Company, and to Messrs. W. H. Everett and Louis P. Donovan, your attorneys of record:

Demand is hereby made upon you to produce at the trial of the above-entitled action and have available for Plaintiffs the following described writings:

1. That form of written agreement which Mr. F. E. Hurley and Mr. A. M. Gee had with them and which they submitted to Mr. T. P. Jones, as

a trustee of Troy-Sweet Grass Oil Syndicate, on or about the 15th day of June, A.D. 1922, at Shelby Montana, for consideration during the negotiations between Mr. F. E. Hurley, Mr. A. M. Sellery, and Mr. A. M. Gee, and Mr. T. P. Jones, pertinent to oil and gas leases then owned by Troy-Sweet Grass Oil Syndicate, and which form of written agreement Mr. F. E. Hurley at the time called or designated as a 50-50 operating agreement, and to which type of agreement Mr. Jones expressly objected and stated he would not go into that kind of an agreement with anybody, and the possession of which form of agreement was retained by said F. E. Hurley.

2. That certain written form of proposed operating agreement which Mr. A. M. Gee presented to Mr. T. P. Jones for approval after Mr. Jones had objected to the written form mentioned in the preceding paragraph number 1 hereof, and at which time Mr. Jones [634] stated, substantially, that such latter form of proposed operating agreement did not conform to his, Mr. Jones', objections, and which form of proposed agreement was retained by Mr. A. M. Gee.

3. Original letter dated June 8, 1923, addressed and mailed to Mr. Lee Yealy, Superintendent of the Ohio Oil Company at Shelby, Montana, from the Inland Empire Oil and Gas Syndicate.

4. Original letter dated September 11, 1923, mailed and addressed to F. E. Hurley, Vice President, The Ohio Oil Company, Findlay, Ohio, with

reference to the I. H. Baker lease, from the Inland Empire Oil and Gas Syndicate.

5. Original letter dated October 3, 1924, addressed and mailed to The Ohio Oil Company, from the Inland Empire Oil and Gas Syndicate.

6. Original letter dated December 1, 1924, addressed and mailed to J. P. Sutton, Assistant Treasurer of The Ohio Oil Syndicate, from Inland Empire Oil and Gas Syndicate and bearing the signature of Robert E. Wilson, as President.

7. Original letter dated January 30, 1924, from The Inland Empire Oil and Gas Syndicate, and addressed and mailed to F. E. Hurley, Vice President, Ohio Oil Company, Findlay, Ohio.

8. Original letter dated January 23, 1925, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, signed R. E. Wilson, President.

9. Original letter dated January 28, 1928, addressed and mailed to The Ohio Oil Company, Shelby, Montana, and purporting to be from the Inland Empire Oil and Gas Syndicate.

10. Original letter dated January 28, 1925, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, and purporting to be from Inland Empire Oil and Gas Syndicate, together with the sheets 1 and 2 attached to aforesaid letter of January 28, 1925.

11. Original letter dated February 9, 1925, addressed and mailed to The Ohio Oil Company,

Findlay, Ohio, purporting to be [635] from the Inland Empire Oil and Gas Syndicate and to which letter is attached a sheet referred to as I. H. Baker Farm, entitled "Tanks."

12. Original letter dated May 11, 1925, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, and purporting to be from Inland Empire Oil and Gas Syndicate.

13. Original letter dated August 8, 1925, addressed and mailed to The Ohio Oil Company, Casper, Wyoming, attention of Mr. Firmin, and signed Freeman, Thelen & Frary, by J. W. Freeman, and pertaining to a dispute which it states has arisen over the interpretation of the agreement dated June 15, 1922, between the Troy-Sweet Grass Oil Syndicate, a common law trust, and the Ohio Oil Company, a corporation, and wherein is purported to be set forth a statement of the more important items of this difference of opinion.

14. Original letter dated July 17, 1925, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, and written by Freeman, Thelen & Frary, acting for Potlatch Oil and Refining Company and Inland Empire Oil and Gas Syndicate, which letter refers to objections theretofore made by Potlatch Oil & Refining Company and Inland Empire Oil & Gas Syndicate to charges made by The Ohio Oil Company in connection with the Operating Agreements made with Troy-Sweet Grass Oil Syndicate, and which letter designates the place where writ-

ten from, at the top of the letter, as Shelby, Montana.

15. Original letter of October 3, 1924, addressed and mailed to The Ohio Company, Findlay, Ohio, relative to discrepancies in invoice covering the Baker lease and written by either Inland Empire Oil and Gas Syndicate or Potlatch Oil and Refining Company, or by them jointly.

16. Original letter dated January 24, 1941, addressed and mailed to Mr. Jack Fredall, Ohio Oil Company, Shelby, Montana, with [636] reference to 1500 ft. of 2" line pipe which was credited by the Ohio Oil Company in the amount of one cent a foot and directing attention that Mr. Lee at Casper, asked \$60.00 for this pipe at one cent a foot, and written by Manager Gerbugh of Potlatch Oil and Refining Company.

17. Original letters of January 9, 1941, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, and Casper, Wyoming, and calling attention to credit for "1500 ft. 2" lead pipe junked" at 1c and offering to purchase this pipe and which letter was jointly from the Potlatch Oil & Refining Company and Inland Empire Oil & Gas Syndicate.

18. Original letter dated December 3, 1938, addressed and mailed to The Ohio Oil Company, Casper, Wyoming, and objecting to charge made against the Baker lease and Sindon Leases for October, 1938, and written by Potlatch Oil and Refining Company.

19. Original letter dated January 28, 1938, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, and written by Potlatch Oil and Refining Company and Inland Oil and Gas Syndicate, pertaining to amount of credit allowed for certain 3" tubing.

20. Original letter of June 9, 1936, addressed and mailed to Mr. L. N. Kiplinger, The Ohio Oil Company, Casper Wyoming, written jointly by Potlatch Oil & Refining Company and Inland Empire Oil & Gas Syndicate, and objecting to certain charges made by The Ohio Oil Company and calling attention to the limitation of charges to be made against Potlatch Oil and Refining Company and Inland Empire Oil & Gas Syndicate.

21. Original letter of May 20, 1936, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, from Potlatch Oil & Refining Company and Inland Empire Oil & Gas Syndicate, and directing attention to the fact that the charges referred to in such letter are not in conformity with either the letter or the spirit of the contracts with the Ohio Oil Company. [637]

22. Original letter dated January 7, 1936, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, objecting to an overcharge of \$100.00 made by The Ohio Oil Company and which letter was written by Potlatch Oil & Refining Company.

23. Letter of December 30, 1935, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, containing objections to certain charges and

credits for casing and equipment made by The Ohio Oil Company and which letter was written by Potlatch Oil and Refining Company.

24. Original letter of December 11, 1935, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, directing attention to error in credits made to the Baker, I. Sindon and B. Sindon accounts, respectively, from Potlatch Oil and Refining Company.

25. Original letter of January 30, 1934, addressed and mailed to The Ohio Oil Company, relative to an error of \$100.00 in addition in the B. Sindon lease account and written by Potlatch Oil & Refining Company.

26. Original letter of July 19, 1933, addressed and mailed to The Ohio Oil Company, Findlay, Ohio, directing attention to an error for gas sold from the I. Sindon lease.

27. Original letter addressed and mailed to The Ohio Oil Company, Casper, Wyoming, attention of Mr. Firmin, dated August 6, 1925, and signed Freeman, Thelen & Frary, and itemizing and specifying various objections to charges made by The Ohio Oil Company against Potlatch Oil & Refining Company and Inland Empire Oil and Gas Syndicate, as successors in interest to Troy-Sweet Grass Oil Syndicate, a common law trust, under an operating agreement theretofore entered into between Troy-Sweet Grass Oil Syndicate and the Ohio Oil Company.

28. Original letter written by Freeman, Thelen, and Frary, addressed and mailed to The Ohio Oil Company, attention Mr. Firmin, dated August 5, 1925, and specifying and itemizing various objections to charges made by The Ohio Oil Company against Potlatch Oil & Refining Company and Inland Empire Oil and Gas Syndicate, as successors [638] in interest to Troy-Sweet Grass Oil Syndicate, a common law trust, under an operating agreement theretofore entered into between Troy-Sweet Grass Oil Syndicate, a common law trust, and The Ohio Oil Company.

29. Copy of The Ohio Oil Company of original letter dated September 12, 1925, addressed and mailed to Freeman, Thelen, & Frary, attention of Mr. J. W. Freeman, written on behalf of The Ohio Oil Company by "F. B. Firmin, Cashier," and purporting to have been written in response to a letter received by The Ohio Oil Company from Freeman, Thelen & Frary as of August 5, 1925, and pertaining to a dispute which had arisen over the interpretation of the operating agreement of June 15, 1922, between "Troy-Sweet Grass Oil Syndicate" and "The Ohio Oil Company" and referring to "the important items involved in this difference of opinion."

30. Original letter addressed and mailed to The Ohio Oil Company, Findlay, Ohio, dated May 11, 1925, referring to a failure to send check for credit balance, and which letter appears to have been written by Potlatch Oil & Refining Company.

31. Original letter dated January 31, 1925, mailed and addressed to The Ohio Oil Company, from Inland Empire Oil and Gas Syndicate, signed R. E. Wilson, President.

32. Original letter dated July 18, 1946, addressed and mailed to Mr. H. R. Healy, Division Manager, Ohio Oil Company, Casper, Wyoming, and from E. J. McCabe, attorney, of Great Falls, Montana, and relating to agreements between Troy-Sweet Grass Oil Syndicate and The Ohio Oil Company and between Potlatch Oil & Refining Co. and the Ohio Oil Company, and relating, among other things, to alleged improper charges made under said agreements by The Ohio Oil Company under said agreements with The Ohio Oil Company and which agreements were referred to as having been executed on June 15, 1922. [639]

33. Original itemized written statement of alleged improper charges made by The Ohio Oil Company against Inland Empire Oil & Gas Syndicate, under operating agreement between the Troy-Sweet Grass Oil Syndicate and Ohio Oil Company, dated June 15, 1922, and delivered to Mr. H. H. Healy, as the representative of The Ohio Oil Company, by E. J. McCabe, as attorney for Inland Empire Oil and Gas Syndicate, at a meeting held between Messrs. H. H. Healy and W. H. Everett, representing The Ohio Oil Company, and E. J. McCabe, representing Inland Empire Oil and Gas Syndicate, in the office building of the Ohio Oil Company at Casper, Wyoming, on July 26, 1946.

34. Original itemized written statement of alleged improper charges made by the Ohio Oil Company against Potlatch Oil and Refining Company, under operating agreement between the Troy-Sweet Grass Oil Syndicate and the Ohio Oil Company, dated June 15, 1922, and delivered to Mr. H. H. Healy, as the representative of the Ohio Oil Company, by E. J. McCabe, as attorney for Potlatch Oil and Refining Company, at a meeting held between Messrs. H. H. Healy and W. H. Everett, representing the Ohio Oil Company, and E. J. McCabe, representing Potlatch Oil and Refining Company, in the office building of the Ohio Oil Company at Casper, Wyoming, on July 26, 1946.

35. Original letter dated November 25, 1946, delivered to Mr. H. H. Healy, as the representative of the Ohio Oil Company, from E. J. McCabe, as attorney for Potlatch Oil and Refining Company, and relating to alleged erroneous and improper charges made by the Ohio Oil Company against Potlatch Oil & Refining Company, under operating agreements made between Troy-Sweet Grass Oil Syndicate and Ohio Oil Company, and between the Ohio Oil Company and Potlatch Oil and Refining Company, which agreements bear date of June 15, 1922, together with the original supplemental itemized statement of such improper charges, delivered on November 25, 1946, to Mr. H. H. Healy. [640]

36. Original letter dated November 25, 1946, delivered to Mr. H. H. Healy, as the representative of the Ohio Oil Company, from E. J. McCabe, as

attorney for Inland Empire Oil & Gas Syndicate, and relating to alleged erroneous and improper charges made by the Ohio Oil Company against Inland Empire Oil & Gas Syndicate, under operating agreement made between Troy-Sweet Grass Oil Syndicate and Ohio Oil Company, which agreement bears date of June 15, 1922, together with the original supplemental itemized statement of such improper charges delivered on November 25, 1946, to Mr. H. H. Healy.

37. Original letter dated January 20, 1947, addressed and mailed to Mr. W. H. Everett, attorney, the Ohio Oil Company, Casper, Wyoming, from E. J. McCabe, and referring to a letter dated January 15th, from Mr. W. H. Everett, attorney, to E. J. McCabe, Attorney at Law.

38. Original letter dated January 20, 1947, addressed and mailed to Mr. H. H. Healy, division manager, the Ohio Oil Company, Casper, Wyoming, wherein it is recited that a copy of a letter mailed on that date to Mr. Everett was enclosed, together with copy of the letter to Mr. Everett mentioned in said letter to Mr. H. H. Healy.

39. Original letter dated February 12, 1947, addressed and mailed to Mr. H. H. Healy, the Ohio Oil Company, Casper, Wyoming, from E. J. McCabe, and referring to a purported letter from said Mr. Healy to E. J. McCabe, dated January 31, 1947.

40. Original letter dated March 19, 1947, addressed and mailed to Mr. H. H. Healy, c/o the

Ohio Oil Company, P. O. 120, Casper, Wyoming, from E. J. McCabe, enclosing copy of complaint on behalf of Potlatch Oil and Refining Company and Inland Empire Oil and Gas Syndicate, against the Ohio Oil Company, and, among other things, referring to the fact that the original complaint was filed in the District Court of Toole County, Montana, on March 18th. [641]

41. Original letter dated July 21, 1922, addressed and mailed to Ohio Oil Company, Shelby, Montana, from Troy-Sweet Grass Oil Syndicate by its secretary and enclosing invoice covering lumber from Sunburst hauled to Sec. 3, Township 35 N, Range 2 W, together with the invoices referred to in said letter.

You Are Hereby Notified That in the event of your failure to produce the above-enumerated writings and documents, that secondary evidence of the contents of any writing or document which you fail to produce at the trial will be offered in evidence on behalf of the above-named plaintiffs at the trial of the above-entitled action.

Dated this 1st day of December, 1949.

/s/ E. J. McCABE,

Attorney for Plaintiffs.

Service of the foregoing notice and receipt of a true copy thereof acknowledged this 1st day of December, 1949.

LOUIS P. DONOVAN,

Attorney for Defendant.

[Endorsed]: Filed December 8, 1949. [642]

[Title of District Court and Cause.]

ORDER TO TRANSMIT ORIGINAL MAP
TO APPELLATE COURT

Upon motion of the above-named Plaintiffs for an Order to Transmit a certain original map, and exhibit, hereinafter specified to the Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause and the court having been duly advised;

It Is Hereby Ordered that the Clerk of this court be, and he hereby is, directed to transmit in physical form and without copying same in the record on appeal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit the following original map, defendant's Exhibit "W," offered and received in evidence on behalf of the defendant at the trial of the above-entitled cause.

And it is further ordered, that the above-enumerated map exhibit shall be received by the clerk of the aforesaid Circuit Court of Appeals and held by him during the pendency of the appeal herein for the use of the court and counsel without having the same printed as a part of the printed transcript of record on appeal, and it is further

Ordered, that after the termination of the proceedings on appeal, the clerk of the aforementioned

Circuit Court of Appeals shall return the said papers and exhibits to the Clerk of this court.

Done this 20th day of June, 1951.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered June 20, [644]
1951.

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 647 pages, numbered consecutively from 1 to 647 inclusive, constitute a full, true and correct transcript of all portions of the record in Case Number 956, Potlatch Oil & Refining Company, et al., versus the Ohio Oil Company, a corporation, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part

of the record on appeal, original exhibits Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 21a, 22, 23, 24, 26, 27, 28, and 29; and Exhibits "G," "H," "I," "J," "K," "L," "M," "N," "O," "P," "Q," "R," "S," "T," "U," "V," "W," "X" and "Y"; and Exhibits "A," "B," "C," "D," and "E," which were received in evidence and have been designated by the appellants as part of the record on appeal.

I further certify that the costs of said Transcript of Record on Appeal amount to the sum of Seventy-Seven and 10/100th Dollars, (\$77.10), and have been paid by the appellants.

Witness my hand and the seal of said Court at Great Falls, Montana, this 11th day of July, A.D. 1951.

[Seal] H. H. WALKER,
Clerk, United States District Court, District of
Montana.

By /s/ C. G. KEGEL,
Deputy Clerk. [647]

[Endorsed]: No. 13010. United States Court of Appeals for the Ninth Circuit. Potlatch Oil & Refining Company, a Corporation, and Jean P. Gerlough, Stanley H. Hodgman and Roy E. Larson, as Trustees of That Certain Trust Known as Inland Empire Oil and Gas Syndicate, a Common Law Trust, Appellants, vs. The Ohio Oil Company, a Corporation, Appellee. Transcript of Record, Appeal from the United States District Court for the District of Montana.

Filed July 13, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

POTLATCH OIL AND REFINING COMPANY,
a Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN and ROY E. LAR-
SON, as Trustees of That Certain Trust
Known as INLAND EMPIRE OIL AND
GAS SYNDICATE, a Common Law Trust,
Appellants and Plaintiffs,

vs.

THE OHIO OIL COMPANY, a Corporation,
Respondent and Defendant.

ORDER EXTENDING TIME FOR
DOCKETING RECORD ON APPEAL

Upon motion of the above-named appellants and
cause therefor shown,

It Is Hereby Ordered that the time for docketing
the record on appeal in the above-entitled Court
and cause be and the same is hereby extended to
and including July 14, 1951.

Done this 25th day of June, 1951.

/s/ W. E. ORR,

Judge, U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed July 2, 1951.

United States Court of Appeals
for the Ninth Circuit

DESIGNATION OF PARTS OF THE RECORD
TO BE PRINTED AND STATEMENT OF
POINTS INTENDED TO BE RELIED
UPON BY APPELLANTS ON APPEAL

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

I.

You will please be advised that the appellants herein do hereby designate for printing in the appeal of the above case the entire transcript of the record forwarded to you by the Clerk of the United States District Court for the District of Montana, in the above-entitled action except plaintiffs' (appellants') original exhibits "A," "B," "C," "D," "E," and "W," transmitted to the above court by order of the aforesaid district Court, together with this designation of parts of the record to be printed and the statement of points on which the appellants intend to rely on appeal filed in the above-entitled action on appeal, together with order extending time for docketing record on appeal given, made and entered in the above cause, by the Honorable William E. Orr, one of the Judges of the above-entitled court, under date of June 25, 1951.

II.

The above-named appellants do hereby make and file this statement of points on which they intend to rely on appeal of the above action:

(1) The complaint in this action seeks a correct accounting of oil and gas produced and sold by defendant from lands embraced in an oil and gas lease known as the "Baker lease," as successors in interest to the original lessee named in the lease and as successors in interest to the rights of Troy-Sweet Grass Oil Syndicate under agreements of such Syndicate entered into with the Ohio Oil Company and will rely generally upon the points that improper and erroneous money charges were made by respondent against the appellants in conducting operations under the agreements and notwithstanding both oral and written objections were made to such charges in statements rendered by respondent and correct accounting and payment demanded and were not corrected resulting in appellants being deprived of their due and proper share of proceeds from oil and gas sold by respondent who was in sole and exclusive possession of the lands and operations of production and sale of oil and gas from the lands and that the trial court was in error in denying the appellants an accounting and rendering judgment in favor of the respondents and that the trial court was in error and appellants will also urge the following points on the appeal: The trial court was in error:

(a) In finding as facts that the pertinent portions of the agreement dated June 15, 1922, between plaintiffs' (appellants') predecessor in interest, Troy-Sweet Grass Oil Syndicate, and the Ohio Oil Company is plain and free from ambiguity and is clear, explicit and unequivocal in its language,

terms and provisions that defendant, the Ohio Oil Company, at all times has fully complied with each and all of the obligations therein imposed upon it.

(b) In finding as facts that T. P. Jones was one of the persons who prepared the agreement of June 15, 1922, and was engaged directly or indirectly in the production and development of oil and gas leases and lands and was experienced in that business and knew or should have known and understood the meaning of the plain language used and contained in said agreement and that said agreement was entered into at arm's length.

(c) In finding as facts that at no time during the period subsequent to Ohio entering into possession of the property, and prior to the time that Troy assigned to Inland and Potlatch, were any objections ever made by Troy to Ohio with reference to the accounting which included the same items as subsequent statements of account made to Inland and Potlatch contained.

(d) In finding as facts that payments made by Ohio were received and accepted by plaintiffs (appellants) during all of said period well knowing that Ohio had repeatedly refused to make any changes in its charges such as plaintiffs (appellants) proposed and plaintiffs (appellants) knew or should have known that the payments were made by Ohio in full payment of the respective items covered in its respective monthly statements.

(e) In making and declaring as a conclusion of law that the agreement of June 15, 1922, between Troy and Ohio is clear and explicit does not in-

volve an absurdity and that the agreement must be ascertained from the agreement alone and it may not be explained or interpreted by parol evidence or reference to matters outside of and not recited in the written agreement.

(f) In making and declaring as a conclusion of law that T. P. Jones' testimony as to the alleged remark of John McFadyen, deceased manager of Ohio, is not admissible for any purpose that no foundation for such testimony has been made and no injustice will be done by excluding it and that no imperfection of the writing is put in issue.

(g) In making and declaring as a conclusion of law that Ohio through a continuous and unvarying course of conduct on its part under the plain requirements of the written agreement since the execution thereof and at all times thereafter during the period questioned in this suit in all things complied with the clear term and provisions of the written agreement of June 15, 1922.

(h) In making and declaring as a conclusion of law that laches in asserting their claims bar plaintiffs (appellants) from any recovery in the action.

(i) In making and declaring as a conclusion of law that the statutes of limitation of the State of Montana bar plaintiffs (appellants) from any recovery in the action.

(j) In making and declaring as a conclusion of law that Ohio is not a trustee for plaintiffs (appellants).

(k) In making and declaring as a conclusion of law that the monthly statements of account furnished by Ohio to Troy, Potlatch and Inland and the acceptance and retention of the money paid to them respectively by Ohio with knowledge that Ohio repeatedly refused to make any changes in its accounting and made each payment in full settlement of each statement constitutes an account stated between Ohio and plaintiffs (appellants) and may not be challenged by them.

(l) In making and declaring as a conclusion of law that plaintiffs (appellants) recover nothing and that defendant do have judgment in its favor and recover from plaintiffs (appellants) all defendant's (respondent's) costs expended in the action.

(m) In rendering judgment in favor of defendant (respondent) and against the plaintiffs (appellants) and adjudging recovery of defendant's (respondent's) costs from plaintiffs (appellants) in the action.

(n) That the findings of fact and conclusions of law made by the court, and hereinabove referred to, were each contrary to the evidence and the law.

(o) That the judgment rendered and entered in favor of defendant and against the appellants, (plaintiffs) is contrary to the evidence and against the law.

(p) That the trial court erred in disregarding the testimony of witness T. P. Jones concerning and relating to the circumstances under which the

agreements were made between Troy-Sweet Grass Oil Syndicate and the Ohio Oil Company and as to what was said and done by the representatives of the parties to such agreement as to the meaning and interpretation which such parties placed upon the agreement at the time of the making thereof.

III.

By filing this statement of points the appellants do not intend to waive or abandon the right to urge error upon any of the rulings or findings of the trial court resulting in a judgment in said cause in favor of the respondent (defendant) and against the appellants (plaintiffs).

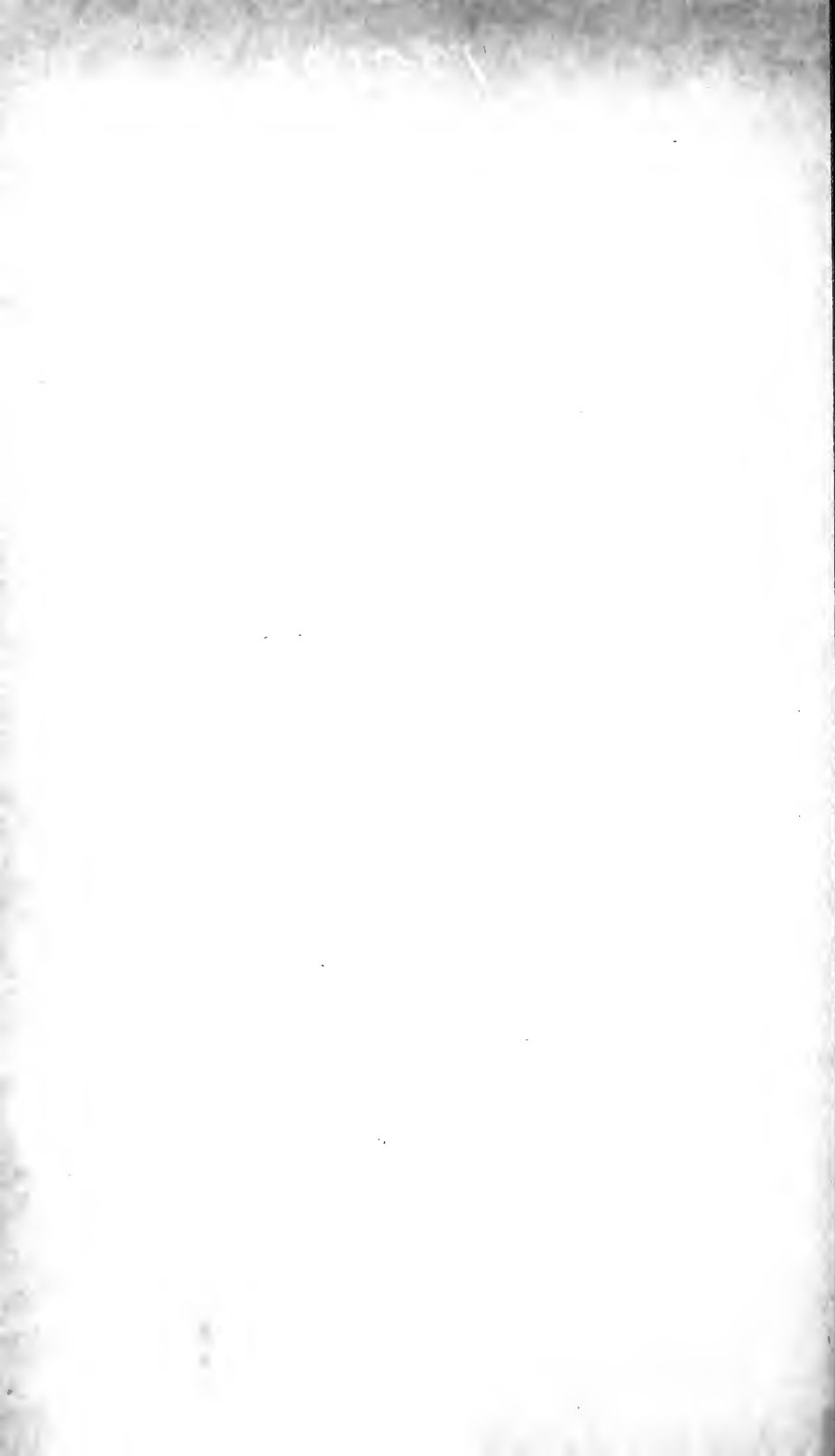
Dated this 24th day of July, 1951.

/s/ E. J. McCABE,

Attorney for Appellants.

E. J. McCABE, JR.,
Of Counsel.

[Endorsed]: Filed July 27, 1951.



United States
Court of Appeals
for the Ninth Circuit

POTLATCH OIL AND REFINING COMPANY,
a Corporation, and JEAN P. GERLOUGH, STAN-
LEY H. HODGMAN, and ROY E. LARSON, as Trus-
tees of that certain trust known as INLAND EM-
PIRE OIL AND GAS SYNDICATE, a common law
trust,

APPELLANTS,

vs.

THE OHIO OIL COMPANY, a Corporation,

APPELLEE.

APPELLANTS' BRIEF

E. J. McCabe,

E. J. McCabe, Jr.

Attorneys for Appellants.

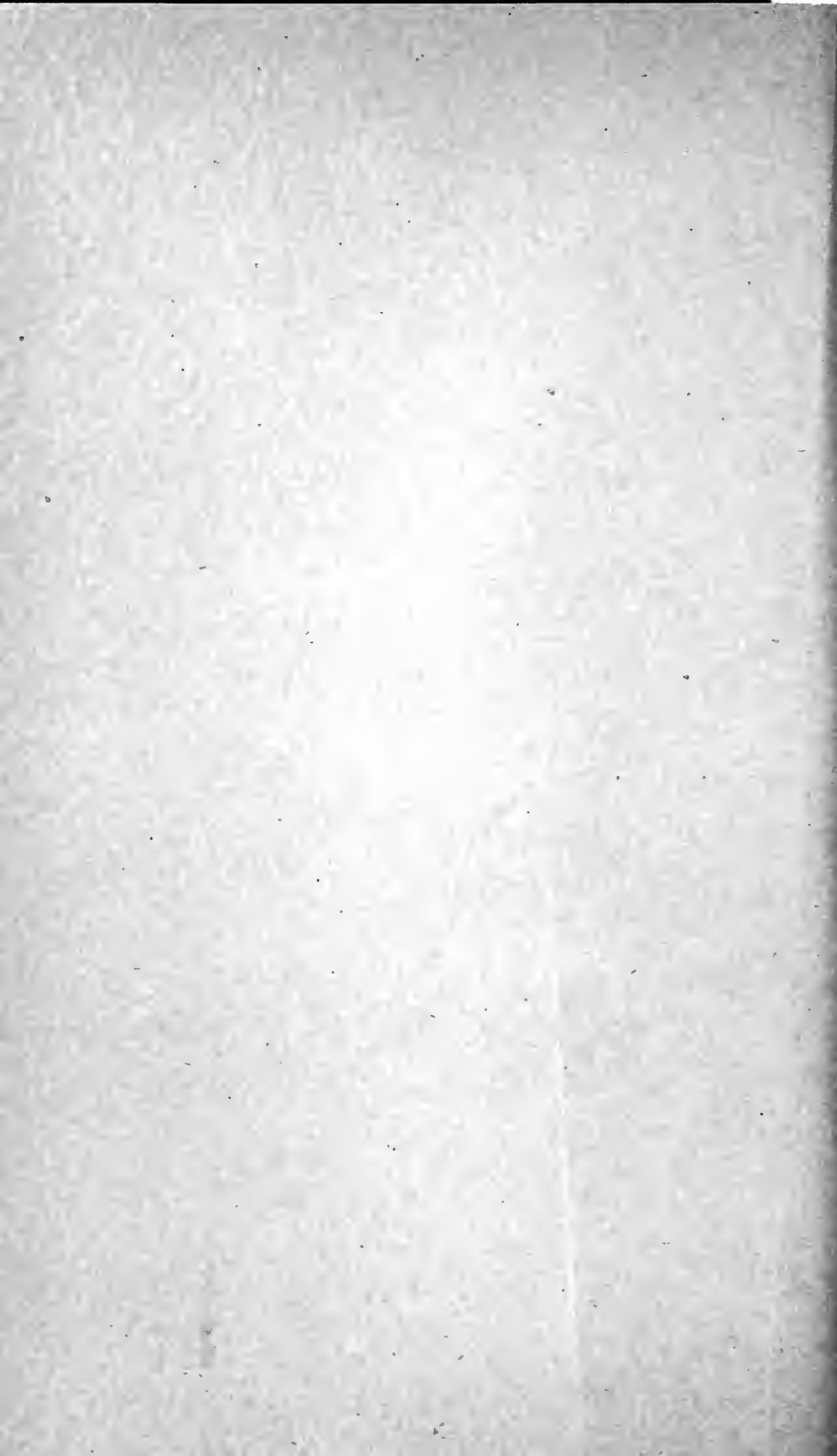
Appeal from the United States District Court for
the District of Montana

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Filed OCT 30 1951 1951

..... PAUL P. O'BRIEN Clerk
CLERK





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United States
Court of Appeals
for the Ninth Circuit

POTLATCH OIL AND REFINING COMPANY,
a Corporation, and JEAN P. GERLOUGH, STAN-
LEY H. HODGMAN, and ROY E. LARSON, as Trus-
tees of that certain trust known as INLAND EM-
PIRE OIL AND GAS SYNDICATE, a common law
trust,

APPELLANTS,

vs.

THE OHIO OIL COMPANY, a Corporation,

APPELLEE.

APPELLANTS' BRIEF

E. J. McCabe,

E. J. McCabe, Jr.

Attorneys for Appellants.

Appeal from the United States District Court for
the District of Montana.

JURISDICTION

This is an appeal from an adverse judgment of the United States District Court for the District of Montana, Great Falls Division, against the appellants (plaintiffs below) and in favor of the appellee, (defendant below) adjudging and decreeing the said appellants take nothing by the suit and that appellee recover its costs in the sum of \$349.07 (R. 157,158). The action was originally commenced in the District Court of the Ninth Judicial District of the State of Montana in and for the County of Pondera by the appellants, citizens and residents of Montana, against the appellee, to obtain a judgment requiring the appellee to account to appellants for alleged monies received and improperly withheld from appellants in connection with certain oil and gas agreements theretofore entered into between appellants and appellee and to pay the appellants the amount of money determined owing to them respectively on such accounting which it is alleged will exceed the sum of \$175,000.00 due three of appellants as trustees of Inland Empire Oil and Gas Syndicate and will exceed the sum of \$195,000.00 due to appellant Potlatch Oil and Refining Company (R. 4-25). The cause was duly removed by appellee to the United States District Court (R. 26-33) on the grounds the cause was a civil action involving a controversy wholly between citizens of different states, the plaintiff, Potlatch Oil and Refining Company, a Montana corporation,

being a resident and citizen of Montana, the other plaintiff being trustee of Inland Empire Oil and Gas Syndicate, a common law trust, being residents of Montana and Idaho, respectively, and defendant Ohio Oil Company being a citizen and resident of Ohio and the amount in controversy (Complaint, paras. I, II, IV, XVI, XVII, R. 4, 5, 15, 16 and R. 26-28) exceeds \$3,000.00, exclusive of interest and costs.

The jurisdiction of the District Court of the United States is found in section 1332 Title 28 United States Codes Annotated, (Title 28 United States Code, section 41 (1). Judicial Code Section 24, as amended) wherein the United States District Court is given jurisdiction over causes between citizens of different states, where the amount in controversy exceeds \$3,000.00, exclusive of interest and costs.

The appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit is found in section 1291 Title 28, United States Codes Annotated (first paragraph), (Title 28 United States Code, section 225), (Section 128 Judicial Code, as amended) wherein the Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to the United States Supreme Court. No such direct appeal to the said Supreme Court is permissible in this case.

STATEMENT OF THE CASE

In referring herein to the parties to this cause, we shall adopt the following designations, respectively:

1. "Potlatch" for Potlatch Oil and Refining Company.

2. "Inland" for Inland Empire Oil and Gas Syndicate, the collective name under which the plaintiff trustees acted on behalf of their trust.

3. "Ohio" for the defendant The Ohio Oil Company; and

4. "Troy" for Troy-Sweetgrass Oil Syndicate, a common law trust.

5. "R.C.M." for the revised codes of Montana.

On June 15, 1922, upon solicitation by Ohio, Troy assigned to Ohio an undivided 55 percent interest in oil and gas leases embracing 1,520 acres of land, comprising five separate tracts, situate in Toole County, Montana, (Complaint's "Exhibit B" R. 23-26) and on the same day, as a part of the transaction, they entered into a written Operating Agreement for the development and operation of the lands for oil and gas purposes (Complaint's "Exhibit A" R. 17-25). These instruments were written up by Ohio and its attorney, A. M. Gee (Jones deposition R. 425 ll. 22-32, R. 426 ll. 1st to 12th, and Gee deposition R. 583, ll. 2nd to 30th, R. 584, ll. 1st to 13th, R. 554 ll. 15th to 29th, R. 555 ll. 1st to 18th).

The Operating Agreement gave Ohio the control

and management of the lands and leases and of the development and operation thereof for oil and gas purposes including the marketing of the oil and gas produced and Ohio entered into control and management of the lands and leases and thereafter had and maintained sole and exclusive control and management thereof for drilling, development, and operation, including the marketing of oil and gas produced and all equipment in connection therewith until and including January 31, 1943, when Ohio sold and conveyed all its interest to The Texas Company. (Complaint, Par. VI and VII, R. 8, 9, Answer, Par. III, R. 54).

January 1, 1923, Troy transferred and conveyed one half of its interest under the Operating Agreement and the pertinent lease to Inland in so far as same pertained to the "Baker Lease" on SW $\frac{1}{4}$ of Section 3 and SE $\frac{1}{4}$ of Section 4, Township 35 North, Range 3 West, M.M., notice thereof given to Ohio about June 2, 1923, who thereafter recognized Inland's rights therein (Complaint para. VIII, R. 10, Answer, Par IV, R. 54). August 18, 1923, Troy transferred and conveyed to Potlatch all of its remaining undivided interest in the Operating Agreement and leases (Complaint Para. IX, R. 10, Answer Para. V, R. 54). Troy transferred and conveyed the foregoing interests expressly subject to the rights of Ohio and Inland and Potlatch expressly agreed with Troy to perform and keep the terms and conditions of all

agreements and contracts transferred by Troy to them respectively. (Answer para V, R. 54, stipulation R. 98).

In the interim Ohio drilled a producing oil well on the lands embraced in the Sindon lease and one on the Baker lease and rendered monthly statements to Troy and later to Inland and Potlatch, setting forth charges and credits, purporting to pertain to operations of Ohio under the Operating Agreement and where a credit for a month was stated as due a check for such amount was mailed to plaintiffs and cashed and proceeds of check retained by plaintiffs, totaling \$250,000.00 approximately. (Stipulation of facts. R. 99-102). Statements rendered have been filed as original documents in this court by order of the district court being exhibits "A", "B", "C" and "D" and vouchers accompanying checks transmitted to plaintiffs being exhibit "E" (R. 196-201). The officers and trustees of Troy, Inland, and Potlatch, respectively, made oral and written objections to certain charges and classes of charges appearing on monthly statements and being made by Ohio against their respective trusts and corporation, asserting that such charges were not properly to be chargeable against them under the Assignment and Operating Agreement and were contrary to the intent of the parties to the Assignment and Operating Agreement. (R. paras. XI, XII, pp. 12, 13, Jones deposition, R. 440-448, Wilson deposition, R. 516-519).

The evidence showing the objections to charges made will be discussed at length in subsequent divisions of this brief devoted to plaintiffs' argument and to avoid repetition, will not be repeated here. Ohio denied improper charges were being made by letters written Inland and Potlatch (R. 306-312, 336-340, 350-355, 65-89).

The plaintiffs assert that as a result of their making the objections and notice in 1926 to John McFadyen, (defendant's division manager in charge of the operations for defendant, R. 96, 97) of their intention given to bring suit against Ohio, Ohio requested that no suit be brought and promised upon a final accounting that any and all improper charges made would be corrected, and due credit would be given and, in reliance upon such promise, plaintiffs withheld suit until after they learned that Ohio, without any notice to appellants of its intention to so do, had sold, assigned, and conveyed to the Texas Company all of Ohio's rights and interests in the Operating Agreement and the lands affected thereby. (R. 446 ll. 28- 30, R. 447-449, R. 229, 230). Ohio failed to account and rectify the alleged improper charges notwithstanding demand to do so was made by appellants to and upon Ohio. (R. 233-238) (R. 369-372). Thereupon the present action was commenced March 18, 1947. (R. 4-25). Evidence in detail pertinent to the foregoing facts will be referred to and discussed in appellants' argument of the facts and the law reserved for sub-

sequent divisions of this brief.

The appellee interposed a consolidated motion for severance of claims, to dismiss for lack of capacity to sue, to dismiss on grounds the action is barred by statutes of limitation. Revised Codes of Montana, 1935, to-wit: Secs. 9028 subd. 2, 9029, 9030, and 9031 subd. 3; for more definite statement and to strike certain portions of the complaint (R. 34-42). The motion was denied with right in appellee to renew motion or any appropriate subdivision thereof at the trial (R. 52).

Appellee answered (R. 53-95) admitting making of the Assignment of interest in leases by Troy and the subsequent entering into the Operating Agreement referred to in the complaint, (R. 53) denied any oral agreement prior to the writings restricting or limiting charges against Troy's share of production to cost of actual drilling of wells at their location on the lands, actual cost of equipment located on the lands and actual cost of installation of equipment and repairs and replacements thereof or any promise to incorporate same in an agreement, (R. 6, 7) (Answer par. ll. 53, 54); admitted defendant's possession and maintaining exclusive control and management of the lands and marketing oil and gas production therefrom and drilling of producing wells and until Ohio sold its interests to the Texas Company on January 31, 1943. (Complaint R. 6,7) (Answer R. 53,54). Answer further denied that assignment and operating agreement

was written and prepared by Ohio and its attorneys (R. 6,7) (R. 53, 54) and denied directing Troy's attention to the clause in paragraph 111 of Operating Agreement which reads "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands," as limiting expenses and chargeable against Troy and denied Ohio represented to Troy the purpose of the clause was to express the true intent to limit expenses chargeable to Troy and denied Troy relied thereon as aforesaid. (R. 7,8) (R. 53,54). The answer admitted transfer of Troy's interests to plaintiffs respectively, continued oil and gas productivity of the leased lands and the exclusive marketing of same by Ohio, denied making improper charges against plaintiffs and that asserted charge for overhead made was not improper (R. 11, 12, 13) (R. 55). Answer admitted certain complaints of improper charges had been made by Potlatch and Inland and meeting held to adjust and written communications with reference thereto in August and September, 1925, and that no other objections made by Potlatch or Inland until July 8, 1946, (R. 13, 14) (R. 55), and Ohio denied it purchased the oil produced at 10 to 20c a barrel below the prevailing market price at the wells (R. 13, 55). Ohio alleges statements showing actual expense of developing and operating the lands were furnished Inland and Potlatch and remitted amount to them when credit

shown and same were received and retained without objection by plaintiffs until July 1, 1946, and thereby an account was stated and settled by the monthly statements between the parties. (R. 13, 14, 57). The answer further denies that Ohio promised that the erroneous and improper charges complained of by plaintiffs would be rectified upon a correct, full, and final accounting to be rendered later to plaintiffs and denied that no full, final and correct accounting had been made or that plaintiffs by reason of charges made had been deprived by defendant from realizing the benefits under afore-said assignment and operating agreement to which plaintiffs were entitled and denied that there will be found due on accounting sums exceeding \$175,000.00 and \$195,000.00 to Inland and Potlatch and further denies that plaintiffs had performed the terms and provisions and conditions of said "Operating Agreement" and "Assignment" (R. 14, 15, 58). The answer purports to plead defenses of laches, statutes of limitations and estoppel and account stated. (R. 58-65).

At the trial an order of the Court was duly made, with the express consent of all parties, that certain questions and issues be determined and a finding and decision on such questions and issues be made by the Court prior to adjudging any accounting to be had and which issues summarized, are (R. 128, 130) substantially.

(a) Is evidence of the character offered by the

depositions of T. P. Jones filed or any similar oral testimony from other witnesses admissible for the purpose of (a) modifying or explaining the terms of the Operating Agreement, copy of which is attached to plaintiffs' complaint herein and marked "Exhibit A", or (b) interpreting the same, and if the Court find such testimony admissible, that the Court further find what the actual agreement was between Troy and Ohio, and that the Court adjudge and declare the true and actual meaning of said Operating Agreement and what costs and expenses of developing and operating the lands involved for oil and gas purposes, as incurred by Ohio, could properly be charged in part to the extent of 45 percent thereof to Troy and successors in interest (R. 128-129);

(b) That the Court determine as an issue in the case the merits of the defendant's first affirmative defense pleading the defense of laches as a bar to the cause of action stated in plaintiffs' complaint (R. 129);

(c) That the Court determine as an issue in the case the merits of the defendant's second and third affirmative defenses wherein defendant pleads the five-year Statute of Limitations and the eight-year Statute of Limitations in its answer (R. 129);

(d) That the Court determine as an issue in the case the merits of defendant's fourth affirmative defense wherein it pleads that there was an account stated between the plaintiffs and defendant by

reason of monthly statements rendered plaintiffs by the defendant (R. 129, 130).

SPECIFICATIONS OF ERROR

1. The trial court erred in finding as facts that the pertinent portions of the agreement dated June 15, 1922, between plaintiffs' (appellants') predecessor in interest, Troy-Sweet Grass Oil Syndicate, and the Ohio Oil Company is plain and free from ambiguity and is clear, explicit and unequivocal in its language, terms and provisions that defendant, the Ohio Oil Company, at all times has fully complied with each and all of the obligations therein imposed upon it, (R. 151 152) as the finding is contrary to the evidence.

2. The trial court erred in finding as facts that T. P. Jones was one of the persons who prepared the agreement of June 15, 1922, and was engaged directly or indirectly in the production and development of oil and gas leases and lands and was experienced in that business and knew or should have known and understood the meaning of the plain language used and contained in said agreement and that said agreement was entered into at arm's length, (R. 152) in so far as the finding purported to include T. P. Jones or other representatives of Troy when the agreement of June 15th, 1922 was negotiated and prepared because the finding is not supported by evidence.

3. The trial court erred in finding as facts that at no time during the period subsequent to Ohio en-

tering into possession of the property, and prior to the time that Troy assigned to Inland and Pottlatch were any objections ever made by Troy to Ohio with reference to the accounting which included the same items as subsequent statements of account made to Inland and Pottlatch contained, (R. 153) as same is contrary to the evidence.

4. The trial court erred in finding as facts that payments made by Ohio were received and accepted by plaintiffs (appellants) during all of said period well knowing that Ohio had repeatedly refused to make any changes in its charges such as plaintiffs (appellants) proposed and plaintiffs (appellants) knew or should have known that the payments were made by Ohio in full payment of the respective items covered in its respective monthly statements, (R. 153, 154) as same is contrary to the evidence.

5. The trial court erred in making and declaring as a conclusion of law that the agreement of June 15, 1922, between Troy and Ohio is clear and explicit does not involve an absurdity and that the agreement must be ascertained from the agreement alone and it may not be explained or interpreted by parol evidence or reference to matters outside of and not recited in the written agreement, (R. 155) as same is contrary to the law.

6. The trial court erred in making and declaring as a conclusion of law that T. P. Jones' testimony as to the alleged remark of John McFadyen, deceased manager of Ohio, is not admissible for any

purpose that no foundation for such testimony has been made and no injustice will be done by excluding it and that no imperfection of the writing is put in issue. (R. 155) as same is contrary to law.

7. The trial court erred in making and declaring as a conclusion of law that Ohio through a continuous and unvarying course of conduct on its part under the plain requirements of the written agreement since the execution thereof and at all times thereafter during the period questioned in this suit in all things complied with the clear terms and provisions of the written agreement of June 15, 1922, (R. 155, 156) as same is contrary to the facts and the law.

8. The trial court erred in making and declaring as a conclusion of law that the statutes of limitation of the State of Montana bar plaintiffs (appellants) from any recovery in the action, (R. 156) as same is contrary to the facts and the law.

9. The trial court erred in making and declaring as a conclusion of law that the statutes of limitation of the State of Montana bar plaintiffs (appellants) from any recovery in the action (R. 156) as same is contrary to the law and the facts.

10. The trial court erred in making and declaring as a conclusion of law that Ohio is not a trustee for plaintiffs (appellants), (R. 156) as same is contrary to the facts and the law.

11. The trial court erred in making and declaring as a conclusion of law that the monthly statements

of account furnished by Ohio to Troy, Potlatch and Inland and the acceptance and retention of the money paid to them respectively by Ohio with knowledge that Ohio repeatedly refused to make any changes in its accounting and made each payment in full settlement of each statement constitutes an account stated between Ohio and plaintiffs' (appellants) and may not be challenged by them (R. 156) as same is contrary to the facts and the law.

12. The trial court erred in making and declaring as a conclusion of law that plaintiffs (appellants)) recover nothing and that defendant do have judgment in its favor and recover from plaintiffs (appellants) the defendant's (respondent's) costs expended in the action, (R. 156) as the judgment rendered is contrary to the law and the evidence.

13. The trial court erred in rendering judgment in favor of defendant (respondent) and against the plaintiffs (appellants) and adjudging recovery of defendant's (respondent's) costs from plaintiffs (appellants) in the action (R. 156) as the judgment rendered is contrary to the law and the evidence.

14. The trial court erred in disregarding the testimony of witness T. P. Jones concerning and relating to the circumstances under which the agreements were made between Troy and Ohio as to what was said and done by the representatives of the parties and the interpretation placed upon the agreement at the time of the making thereof (R. 413, 423-429, 430-433, 467-473) for the reason

such testimony was legally competent, relevant and material, and properly admissible as evidence in the case.

ARGUMENT

In considering the questions specified in the above mentioned order of the Court, (Ante P. 10-12) we shall direct our discussion to such questions in the sequence specified in the order.

(1) Admissibility of testimony of T. P. Jones to explain (and) eliminate ambiguity and uncertainty in the assignment and Operating Agreement.

At the threshold of inquiry as to whether the testimony of T. P. Jones is or is not admissible, we are confronted with the query whether ambiguity or uncertainty arose by reason of the prior verbal agreement pursuant to which the written assignment of the leases (R. 23-25) was executed and the terms of the Operating Agreement signed by the parties after the prior written assignment was given (R. 17-22), as to the intent of the parties thereto. If so, then the Jones' testimony relating to what was said and done prior to and at the time of the making of the assignment explanatory of the verbal terms of the prior agreement pursuant to which the assignment of leases was made and explanatory of any ambiguity or uncertainty arising from the language used in the written operating agreement, the surrounding circumstances and the situation of the parties is admissible to remove the ambiguity or uncertainty unless the testimony is excluded by other

contrary evidentiary principles. The statutory rules of interpretation appear in Chap. 7 R.C.M. 1947, (Chap. 108. R.C.M. 1935), and include the following statutes:

“A contract must be so interpreted as to give **effect to the mutual intention of the parties as it existed at the time of contracting**, so far as same is ascertainable and lawful” (Emphasis supplied).

Sec. 13-702 R.C.M. 1947, Sec. 7527 R.C.M. 1935).

“For the purpose of ascertaining the intention of the parties to a contract, **if otherwise doubtful**, the rules given in this chapter are to be applied.” (Emphasis supplied).

Sec. 13-703 R.C.M. 1947, Sec. 7528 R.C.M. 1935.

“When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter.”

Sec. 13-705 R.C.M. 1947, Sec. 7530 R.C.M. 1935.

“The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.”

Sec. 13-707 R.C.M. 1947, Sec. 7532 R.C.M. 1935.

“A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.”

Sec. 13-713 R.C.M. 1947, Sec. 7538 R.C.M. 1935.

“For the proper construction of an instrument, the circumstances under which it was made including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.”

Sec. 93-401-17 R.C.M. 1947, Sec. 10521 R.C.M. 1935.

“If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promissor believed at the time of making it that the promisee understood it.” (Emphasis supplied).

Section 13-714 R.C.M. 1947, Sec. 7540 R.C.M. 1935.

Analysis of the written assignment of leases (R. 23-26) and the written operating agreement discloses the existence of a prior verbal agreement pursuant to which Troy executed the written assignment. The terms, intent, provisions, conditions and considerations of such verbal agreement were not reduced to writing and resort must be had to oral testimony to determine what they were. Thus the written assignment is uncertain since it is silent as to the actual oral agreement and oral testimony of witness, T. P. Jones, the representative (president) executing the assignment for Troy (R. 23-26) and who also signed the operating agreement for Troy (R. 17) may give oral testimony as to what the terms and intent of verbal agreement was as authorized by the foregoing provisions of the Montana Codes.

Brown et al. v. Homestake Exploration Corporation, et al, 98 Mont. 305, 39 Pac. (2) 168;

Van De Putte et al v. Texas Pacific Coal and Oil Company, 35 Fed. Supp. 794.

Obviously the terms of a verbal (parol) agreement may be proven only by oral testimony.

The complaint (R. 6 ll. 20th to 32nd) alleges the express oral agreement between Troy and Ohio made prior to reduction of the assignment to writing was that Troy's share of the "costs and expense incident to the drilling, development and operation of the lands described in said "assignment" for the production of oil and gas chargeable against the share of said syndicate of the oil and gas production from the described lands would be restricted and limited exclusively to the cost of the actual drilling itself of the wells at their locations on said lands except the expense of the drilling of the first well which was to be borne solely and wholly by the Defendant, and the placing of said well in condition to deliver the oil and gas production therefrom at their respective locations upon said land plus the actual cost of the equipment located wholly within and upon the said lands and the actual cost of the installation of said equipment and that all other costs of operating said lands and producing and marketing the oil and gas therefrom would be the sole expense of and wholly chargeable to the Defendant alone." (R. 6 ll. 20-32, R. 7 ll. 1-12). The oral evidence submitted to the trial court as proofs of the allegations was contained in the deposition of T. P. Jones (R. 413-509). Over objection of counsel for Ohio as to competency of witness to testify to any oral conversations, oral communications or direct transactions with F. E. Hurley, Art Sellery or John McFadyen, agents then de-

ceased of Ohio, and as being an endeavor to vary the terms of a written instrument by parol testimony (R. 421) Jones testified:

“Q. (By Mr. McCabe); Now Mr. Jones, on the date that this instrument, the original of Plaintiffs’ Exhibit 2, was signed by the parties named therein, did you have any conversation with Mr. Hurley and Mr. Gee with reference to entering into any arrangements for the drilling and development of lands of the Troy-Sweet Grass Oil Syndicate?

A. I did.

Q. And was that on the same day as the agreement was signed?

Mr. Donovan: I object to this as leading.

Mr. Everett: Let’s let the witness testify, Mr. McCabe. You are insisting that we not have an objection to the form of the question, but still you insist on making the questions leading.

Mr. McCabe: I don’t think that is leading.

Mr. Everett: Of course it is leading. You are on direct examination now. On cross-examination we can lead him all over the place, but you can’t.

(Last question read).

A. It was.

Q. (By Mr. McCabe): Now, what did Mr. Hurley or Mr. Gee in the presence of yourself and Mr. Gee and Mr. Hurley say to you in connection with * * *

Mr. Donovan: That is objected to as being uncertain. (441) It doesn’t designate the person. It is also uncertain as to the place where the alleged transactions or conversations were had.

Q. (By Mr. McCabe): Where was the original of Plaintiffs' Exhibit 2 signed?

A. In my office in Shelby, Montana.

Q. And at that time who was present?

A. Mr. Hurley, me, Mr. Luke, my secretary—the secretary of the Troy-Sweet Grass and this other gentleman, Mr. Sellery. Mr. Hurley and Mr. Gee came in there and asked me to know if I could and would make an operating agreement on some land held by my company that I represented, and I told them

* * * *

Q. Just a minute. Who was it asked you that—Mr. Gee or Mr. Hurley?

A. Mr. Hurley, after they introduced themselves.

Q. And what did you answer?

A. Well, I asked them—They described the land that they wanted to make an operating agreement on. I couldn't describe them right here now. And I told them that I had contacted the California a couple of times prior to that, of they had contacted me and wanted some lands on a fifty-fifty operating agreement, and presented me with a copy, which I read, and I objected, or told them what I would do; I would dictate the terms of the contract.

Q. What did you say to them in response to their inquiry whether you would be willing to enter into a deal?

A. Well, I told them that I would under my terms.

Q. Then what did they say to you?

A. They asked me what my terms were, and I explained them (442) to them.

Q. What did you tell them the terms were that you wanted?

- A. I told them that I would enter into an agreement with them, but not where any expenses would be charged to this land off of the lease, of Findley, Ohio, or any place else off of that lease, and so then, after a conversation of quite a while, why, Mr. Hurley, or one of them spoke up and said, "Well, the charges wouldn't be in excess of probably ten per cent," and I told them, "All right, gentlemen, if that is all it will be, I will give you forty-five per cent and you can take fifty-five per cent, and you can pay the expenses, and put that into a lease, and we can make an agreement," and Mr. Gee said he would write up that kind of an agreement. I said, "There is a typewriter here and paper." He says, "I have a typewriter right over here, and I will go over and write it," which he did, and when he came back he had an operating agreement written up in duplicate. I think it was triplicate.
- Q. A moment ago you said that in this conversation you told them you would give them the forty-five per cent, and also you said you would give them the fifty-five per cent.
- A. No, I said I would give myself forty-five per cent and them the fifty-five per cent.
- Q. That is what I wanted to get straightened out.
- A. If they would bear all of the expenses, in place of a fifty-fifty, and charge me only what operating expense was incurred right on the lease, and they said * * * *
- Q. Now, just a moment. Was there any particular form of expression that you used at that time as designated the (443) expenses chargeable?
- A. Well, I said that their expenses would be charged all over the country, their overhead,

the accounting and everything else would be charged up against that lease, and I had no way of keeping account of that.

Q. Was that under the fifty-fifty operating agreement?

A. That was the fifty-fifty.

Mr. Everett: We object to the form of the question there again. There is no fifty-fifty operating agreement here in evidence. If you are going to question him about some other contract, let's get it out here, Mr. McCabe; otherwise, we will have to object to the form of the question and insist that the Court consider our stipulation with you as not in effect because you are not following it. Certainly, we are not going into the trial of this case with any sort of an understanding that we won't object to the form of the question and let you proceed in a manner that is absolutely contrary to that agreement and at the same time try to hold us to it.

Mr. McCabe: Well, the witness testified that they suggested fifty-fifty and he said he wouldn't go into that agreement.

Mr. Everett: You are asking him about a fifty-fifty agreement, but there is no such agreement in evidence.

Q. (By Mr. McCabe): Now, Mr. Jones, did you, at the time when they first approached you, or that is, when Mr. Hurley and Mr. Gee first spoke to you about any deal concerning the Troy-Sweet Grass Syndicate leases or lands—did they have a form of agreement with them?

A. Yes, they had some blank forms, fifty-fifty.
(444)

Q. And was that agreement they had commonly

called, a form known as a fifty-fifty operating agreement?

Mr. Donovan: We object to this as leading; object also on the formal ground that all oral negotiations are deemed to be merged in the written contract. Prior oral negotiations and statements are entirely irrelevant and immaterial.

Mr. McCabe: Just answer the question.

(Last question read.)

Mr. Everett: We object on the further ground that the witness has not been qualified as an expert to testify as to what was the commonly known form or any other form of contract.

Q. (By Mr. McCabe): Just a moment. Mr. Jones, this first written form that they submitted to you, did they call it or designate it by any name?

Mr. Everett: I object to that, too.

A. Fifty-fifty operating agreement, they told me it was.

Mr. Donovan: This is objected to because that is leading.

Q. (By Mr. McCabe): Now, answer the question again.

A. They called it a fifty-fifty operating agreement.

Q. Who called it that? A. Mr. Hurley.

Q. At that time did you make any objection to that type of agreement? Did you state to them that you had any objection to that type of agreement?

A. I did.

Q. What did you tell them?

A. I told them that I had objected to the California a couple of days prior, and I objected to theirs. I wouldn't go into that kind of an agreement with anybody. (445)

Q. Now, when you outlined or stated to them as you testified, the terms of the deal that you would go into with them, did you mention in describing the expenses, or did you describe the types of expenses that you would be willing for the company to pay their share of?

Mr. Donovan: This also is objected to as leading and suggestive."

R. 423-429.

"Q. Now, when you outlined or stated to them, as you testified, the terms of the deal that you would go into with them, did you mention in describing the expenses, or did you describe the types of expenses that you would be willing for the company to pay their share of?"

Just answer "Yes" or "No."

A. I did.

Q. Now, what did you say:

A. I told them I would be willing to share the expense of drilling wells, putting them into production on the lease, but not a lot of outside expenses all the way around the country, which Mr. Hurley said probably it wouldn't amount to much; probably ten per cent or less, maybe.

Q. And then what did you say:

A. I said, "All right, let's do this: I will give you five per cent of ours, making yours fifty-five per cent, and you pay all of the expenses outside the lease."

- Q. Let me see if I understand you correctly. Did you say that your people would take forty-five per cent and you would give the company fifty-five per cent?
- A. Yes, which would make it ten per cent to pay the outside expenses. Mr. Gee said he could write up a contract (447) covering that.
- Q. Was there anything said at that time pertaining to the corners of the lease?
- A. These expenses was to be just what was on the lease; not off the lease.
- Mr. Everett: We object to that question and answer, the question as being leading, and ask that the question and answer both be stricken.
- Q. (By Mr. McCabe): Now, after this conversation did Mr. Gee return to you a form of proposed operating agreement to be signed?
- A. He did.
- Q. And did you read it?
- A. I did, and objected to it.
- Q. Just a moment. You say you did. When you read it, what did you say to him?
- A. I told him that the objections that I had made and wished to put in the lease wasn't in there. He said, "I will go and rewrite it and include it in there," and he did.
- Q. Just a minute. After he said that he would change it and include it into the lease, did he go away, or what did he do?
- A. He went away, over to his office, and was gone a while and came back with some copies rewritten, which had * * *
- Q. Just a moment. Copies rewritten—of the proposed form of agreement?

A. Yes, sir.

Mr. Everett: Let's let the witness testify. This leading business, I think we understand what it is, and it will certainly simplify it from the standpoint of the examination, too.

Q. (By Mr. McCabe): Did you read the last form that he returned to you?

A. I did, and he pointed out to me where it was covered; my objections were covered in it.

Q. What did he say when he pointed out that paragraph?

A. He said that covered the objections that I had; that there would be no charges against the company except what was done on their ground; the way I understood it; as he explained it to me, at least.

Q. At that time was there any agreement similar to the one concerning which you have testified made with Potlatch Oil and Refining Company?

A. Yes.

Q. And with reference to the form of that agreement, was that similar to this agreement?

Mr. Donovan: We object to this.

Mr. McCabe: All right. I withdraw it.

Q. When Mr. Gee made this statement concerning this portion that he had included in the proposed form of operating agreement, was Mr. Hurley present?

A. Yes, sir.

Q. And after he made that statement, what did you do with reference to the original operating agreement of which Plaintiffs' Exhibit 2 purports to be a copy?

A. What did we do?

Q. What did you do?

A. We signed it up.

Q. You signed it, and who else signed it?

A. Mr. Luke signed it and the Ohio men (449) signed it.

Q. And by "the Ohio men," who do you mean?

A. Why Hurley and Sellery. I don't know whether Gee signed it. I don't think Gee signed it, as I remember."

R. 430-433.

On cross examination the witness testified:

"Q. Were the expenses of operation supposed to be paid by Potlatch or Troy Sweet Grass or Inland Empire?

A. Expenses on the lease were supposed to be paid, for the drilling of wells and putting them into production, but that is as far as the expenses were supposed to be paid by (481) the Potlatch and the Troy-Sweet Grass, drilling the wells and putting them into production. That was my interpretation of it. That is what I understood it was, what the contract called for.

Q. Was it your contention that Potlatch was to pay no part of the cost of operation after the well was drilled and put in production?

A. Well, no. It was my contention that they wasn't to pay after the wells was drilled and put into production.

Q. The Ohio was to pay the expenses, pay everything?

A. Yes, pay everything.

Q. Without any part of the charge being made against Potlatch?

A. Not after they were producing.

Q. That would include all costs of operation?

A. Yes, sir:

Q. No part of the cost of operation, pumping the well, would be paid by Potlatch of Inland Empire?

A. Nothing off of the lease.

Q. No, I mean no part of the cost of operating the well would be paid by Potlatch after the well was once drilled and put on production? Is that what we are to understand?

A. They were to operate the lease. We were to pay for drilling the wells or getting them to producing. We were to pay—then they were to operate the wells and give us our forty-five per cent, and they were to charge us nothing after that.

Q. Charge you nothing after that?

A. No.

Mr. Everett: Let me see that contract a minute. (482)

(Exhibit 2 handed to counsel.)

Q. The contract about which you testified earlier, Mr. Jones, reading from Paragraph 3 of Plaintiffs' Exhibit 2, provides, and referring to The Ohio Oil Company as party of the second part: "It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part forty-five per cent thereof."

A. Yes.

Q. Now, am I to understand from your testimony that that doesn't mean what it says? What does that mean to you?

A. My interperation of the lease was that they should drill the wells and put them in produc-

tion and we would pay our forty-five per cent of it.

Q. And from there on you pay nothing?

A. No, no.

Q. Well, you were to pay your cost of operation, then?

A. Well, that wasn't the way I understood it. They were to ---

Q. How did you understand it?

A. I understood they would drill the wells and charge us after the first well was drilled, the free well, no cost to us at all. Then they would drill the wells and equip them and we would pay our forty-five per cent of drilling the wells and equipment, and nothing for supervision or accounting outside of that, and then after they were drilled they could pump them and take the oil and pay us forty-five per cent of the oil.

Q. What about the cost of operation?

A. Operation would not be much after the (483) well drilled and operating. That was up to them.

Q. And no part of that was to be charged to the Potlatch?

A. Except for the maintenance of the equipment and so on. No labor was to be charged to the Potlatch.

Q. No labor was to be charged to the Potlatch.

A. No.

Q. You testified you were engaged in other businesses. Isn't labor a cost of operation? Is it your contention that labor is not a cost of operation?

A. Yes, I understand all of that. I do lots of busi-

ness, but we had an understanding what it was to be. Mr. Gee and Mr. Hurley said that would cover the whole thing. That was the clause I had put in there, and there would be nothing charged to us after the wells were put into operation.

Q. You were not to be charged with the cost of operation? Did you read this contract before you signed it?

A. I surely did.

Q. Well, what does "all costs and expenses of developing and operating said lands"—what does that mean to you?

A. It means what it says.

Q. Were they to make—was it your understanding that any part of the amount charged to you was to be paid in cash—charged to your company; any of the amount, the expenses of developing and operating, charged to Potlatch? Were they to be paid in cash?

A. By who?

Q. By Potlatch.

A. No. They were taken out of production, interest and all. (484)

Q. Suppose the charge exceeded the credit, were you to be held beyond that?

A. No, no, no. If they didn't get the production, they were out. We weren't to be held at all.

Q. Well, isn't that what your phrase says here, then: "But in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands"?

A. Read that again.

Q. Let's go back. Isn't that what your phrase:

“But in no case shall said party of the first part” (referring to the Troy-Sweet Grass) “be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands”? Isn’t that what that means?

A. I don’t gather what you are driving at. It means just what it says there.

Q. Well, it is payable out of oil? isn’t that what it means? The amount that was charged to you was payable out of oil produced?

A. Absolutely.

Q. And that is what you mean by your contract?

A. Yes, sir, that they are to take their pay out of any oil they find.

Q. So if there was more due than there was oil to pay, the Ohio got nothing?

A. The Ohio got nothing.

Q. And that is what that phrase meant, that they didn’t get paid unless the oil was there; unless they had production?

A. That phrase meant that they should charge against that lease nothing only what was on the lease. (485)

Q. That was your contention?

A. Yes, that is the way we understood it right there that day, and that was drilling the well and the equipment that went into that.

Q. You objected also to the interest charges, did you, on the monies advanced?

A. I objected to the interest charges so long as there shouldn’t have been any charge to us. They had us charged with a lot of stuff that didn’t belong to us and charged us interest on it. I objected to that, of course.

Q. Did you object to any other interest charges?

A. No, not where we legally owed them.

Q. Well, there is a \$10,000 balance they charged you interest on?

A. They charged us interest. Maybe that balance shouldn't have been so big, though. That is what I am contending; that balance shouldn't have been that big, maybe, if they had us charged with a lot of stuff that didn't belong to us.

Q. That was your contention?

A. Yes, that was my contention.

Q. Did the Ohio, insofar as the balance of the contract, except for the accounting phases of it, comply with all of the provisions?

A. Why, yes and no.

Q. Well, explain your answer.

A. Well, Mr. Hurley impressed upon me that they could drill wells cheaper than anyone else because they had lots of tools in the field and there would only be a charge of reasonable rent for tools in the field against that lease; there (486) would be no tools charged, only rental; and they could drill wells cheaper than I could. I could drill some of them wells for \$10,000 myself; most of them.

Q. Well, there was still a matter of the amount of the charge. So far as complying with the contract, if they were obligated to drill a well, they drilled it?

A. Oh, yes. I had no kick on the accounting of the amount of wells they had drilled on the lease. I hadn't when I left there. I didn't care—when they drilled out there and got water, well, I didn't care about them going

on the other side and drilling another water well.

Q. The only complaint you had was the matter of the accounting, the charges?

A. Yes, sir.

Q. Otherwise, they complied with their contract?

A. On drilling wells, they did.”

R. 467-473.

In the case of Brown, et al, v. Homestake Exploration Corporation, et al, 98 Mont 305, 39 Pac. (2) 168, the Supreme Court of Montana in construing a contract for development and operation of lands for oil and gas which contained a provision for drilling of exploration wells “to such number and extent as the premises will admit of” held such quoted clause ambiguous as to the number of wells and that parol evidence was admissible to show what the intent of the parties was at the time of the making of the contract. The Court reviewed, at length, prior decisions of the Court and the Montana statutes pertinent to ambiguous and uncertain provisions of contracts, and which prior decisions sustained the principle of the cited case.

In the action of Van De Putte et al v. Texas Pacific Coal and Oil Company, 35 Fed. Supp. 794, this Court considered and interpreted the same agreement that was considered by the Montana Supreme Court in the Brown case, above cited, as to items of expenses properly chargeable by the operating company against the other parties to the agreement.

We quote from the opinion of this Court as presenting a clear and concise statement of the questions of chargeable expenses proper under the agreement.

“Homestake, a corporation, engaged in the drilling and operation of oil and gas wells, agreed to develop the lands embraced within these permits according to the terms of the said agreement. Homestake is to stand the expenses of drilling the first well and, if production is obtained, ‘shall be reimbursed for the expense of drilling said well out of the proceeds therefrom *** but not otherwise.’ Further provisions respecting all wells drilled by Homestake are that they: ‘Shall be drilled at its own expense, but shall be reimbursed for the said expenses of drilling out of the net production obtained from the lands’; ‘The net proceeds of all oil and/or gas produced and saved’ after payment of royalties ‘and after paying the expenses of the drilling operation conducted upon said land, shall be divided equally between the parties *’’. Another important provision relating to expense is found in paragraph 7 of the agreement, as follows: ‘It is expressly understood and agreed that the term “expense of drilling” or the term “expense” where used herein to denote the expense of sinking a well for the purpose of producing oil and/or gas shall be defined to mean only the actual cost and expense of drillings, equipping and placing all wells in a state of production and such other expense as may be necessarily incurred in development and operation of said wells, and of maintaining them in a state of production, with an additional ten per cent (10%) thereof added thereto for administrative, engineering and overhead expenses.’ In another part, paragraph 8, Homestake agrees to furnish second parties an accurate and detailed statement of its operations provided for in the agreement.”

35 Fed. Supp. 795.

Under section 43 (a) Federal Rules of Procedure, the evidence is admissible if same is admissible under any rule of evidence, state or federal. The rule reads:

“All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.”

As will appear from the authorities cited in subsequent paragraphs of the within brief, the present action is a proceeding in equity. Under the foregoing rule the principle which favors the reception of evidence is to be adopted and, if admissible under any of the rules of evidence, state, federal, or rules heretofore applied in courts of equity, it is admissible in the present controversy.

“In equity the rule apparently is that all evidence should be taken and entered in the record even though the court rules out the testimony and therefore objections as to relevancy and admissibility are not to be considered. The only limitation upon the extent of the examination is apparently that it should be confined to the issues and not violate the personal privilege of the witness.”

Blease v. Garlington, 92 U. S. 667, 23 L. Ed. 521.

Continental Securities Co. v. Interborough Rapid Transit Co. (C.C.A. South Dist. New York, 1910) 183 Fed. 132.

“If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor” (Ohio) “believed at the time of making it that the promisee” (Troy) “understood it.”

Section 7540 R.C.M. 1935.

“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”

Section 7545 R.C.M. 1935.

In this case the attorney for the Ohio prepared the agreement and hence was responsible for the uncertainty, thus making applicable the preceding statutes cited.

The Operating Agreement was entered into by Troy and Ohio for the development and operation of the lands described for “oil and gas purposes” and Troy at the time had theretofore conveyed an undivided fifty-five percent (55%) interest in the lands to Ohio. (R. 17, 23) The control and management of the lands and leases and of the development and operation thereof for oil and gas purposes, including the marketing of the oil and gas produced, was given to Ohio. (Par. I of Operating Agreement, R. 18).

Ohio promised to drill a first well on the lands “free of all costs and expense” to Troy and, if a

failure and of no commercial value, Ohio could surrender the leases and thereupon Troy would have no right or title whatsoever in tools, materials or equipment of any kind furnished for the drilling of such well. (Par II of Operating Agreement), (R. 18, 19).

Paragraph III of the agreement (R. 19, 20) then delineates the obligations of Ohio if the first well was a producer, "commercial well," and the extent of Troy's liability for "expenses." The question presented to the Court for determination is, what was and is the liability of Troy and its successors, Inland and Potlatch, for expenses connected with Ohio's performance of the Agreement? Plaintiffs assert their liability and Troy's was limited to sharing a part only of the expenses Ohio claims it incurred and Ohio claims Troy's and plaintiffs' liability extended to forty-five percent (45%) of all expenses, direct and indirect, and irrespective of how or where incurred by Ohio in connection with its interpretation of the contract plus an additional ten percent (10%) for alleged "overhead" expenses, notwithstanding no ten percent (10%) allowance for overhead is mentioned as chargeable against Troy or its successors and notwithstanding words of limitation in the agreement to the effect Troy (and successors) "**in no case shall**" "be finally held or charged beyond its share or interest in the production and equipment from, in, or upon said lands" (R. 20 ll. 8-11). An examination of all the

provisions of paragraph III clearly discloses ambiguity and uncertainty concerning “expenses” chargeable to Troy and plaintiffs. This paragraph (R. 19, 20) reads:

“III. In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and as is consistent with good business management. It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part Forty-five (45%) per cent thereof. Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) per centum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof. The said party of the second part shall be reimbursed by the said party of the first part solely from the first party’s proportion of the oil and gas produced and sold from said land. Application from proceeds from sale of said oil and gas will be made to the credit of the first party’s account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The party of the second part shall be entitled to and shall charge the party of the first part eight (8%) per centum interest upon all moneys so advanced for the development and operations upon said lands for the account of the interest of the first party’s until the same shall

have been paid out of the proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production."

The Court will observe that Ohio's interpretation of this paragraph would necessitate the language of the paragraph to provide substantially that if the first well drilled was a "commercial well" all costs and expenses of every kind and character incurred by Ohio in performing its obligations plus an additional charge of Ten (10%) percent to be added to the total of said costs and expenses as overhead expense, and Ohio shall be reimbursed by Troy solely from Troy's proportion of the oil and gas produced and sold from said lands, and that Ohio shall have a lien upon Troy's interest in the production and in the equipment in and upon the land; Ohio shall be entitled to and shall charge Troy Eight (8%) percent interest upon Forty-five (45%) percent of the total amount expended by Ohio until same shall have been paid out of the proceeds of Troy's proportion of the oil and gas produced and sold, said interest to be also paid out of Troy's share of the production from the lands.

The express language of paragraph III (R. 19, 20) is considerably different from what Ohio claims it substantially reads and means. Analyzing the paragraph, the provisions thereof appear substantially in the following order:

(a) If the free well to be drilled shall prove a commercial well, Ohio shall continue the "work of

developing and operating said premises” in as diligent a manner as warranted by field and market conditions and as consistent with good business management.

(b) Ohio will pay “all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided.” Observe that Ohio is expressly limited to all costs and expenses of **“developing and operating said lands for oil and gas purposes, as herein provided and charge”** Troy Forty-five (45%) percent thereof. (Emphasis ours). No provision appears for Ten (10%) overhead or for expenses for operations or developments outside of the lands particularly described.

(c) Ohio shall market all oil and gas produced upon said land and “account” to Troy for the undivided Forty-five (45%) percent of the proceeds thereof at the prevailing market price at the wells for said oil and gas after “deducting all royalty oil and gas” or the proceeds thereof. The Court will note that no deduction for any “marketing expenses” is stated (R. 19).

(d) Ohio is to be “reimbursed” by Troy “solely from” Troy’s “proportion of the oil and gas produced and sold from said land” (R. 19, 20).

(e) Application from proceeds from sale of the oil and gas will be “made to the credit of” Troy’s “account upon the first day of the month following that in which oil and gas is sold, **but in no case shall**” Troy **“be finally held or charged beyond its share or**

interest in the production and equipment from, in or upon said lands.” (Emphasis supplied.) (R. 20)

(f) Ohio is to charge Troy Eight (8%) percent interest upon “all moneys so advanced for the development and operations upon said lands for the account of the interest of Troy “until same shall have been paid out of the proceeds of” Troy’s “proportion of the oil and gas produced and sold as herein provided ,said interest payments to be also paid out of production.” Paragraph IV (R. 20) of the Operating Agreement provides for monthly statements to Troy and provides:

“IV. The party of the Second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expenses of developing and operating said lands and leases and will remit monthly to the party of the first part all proceeds of the oil and gas sold from the interest of the first party over and above the amount necessary to reimburse the party of the second part for expenditures made by it for the account and interest of the party of the first part.”

We respectfully request the Court to observe the language of this paragraph as to the scope of the statements as being limited to the **“actual cost and expenses of developing and operating said lands and leases”** and that no provision is made for overhead or expenses elsewhere than on the lease and no provision for marketing expense.

In view of the different language and expressions appearing in the agreement as to what expenses

Ohio actually is entitled to reimbursement from Troy and which language and expressions express varying concepts of expenses there is presented a clear case of ambiguity and uncertainty in the Operating Agreement as to the intention of the parties as to expenses chargeable against Troy.

The agreement properly distinguishes between expenses for developing the land for oil and gas, operating the land for oil and gas, and of marketing the oil and gas production. In paragraph III of the agreement in referring to reimbursable expenses the following varying expressions appear: "all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided;" then "second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) percentum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof." (This would indicate that expenses would be confined solely to development and expenses incident to placing the wells in condition to deliver the product at the wells only); then "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the **production and equipment from, in or upon said lands,**" (Emphasis supplied.) (Here is indicated that Troy would be charged with its Forty-five (45%) share of the cost of equipment on the lands and to be paid out of

its share of the production);

Troy to be liable for Eight (8%) percent interest “upon all moneys so advanced for the **development and operations upon said land**,” (Emphasis ours), indicating Troy chargeable with interest on its share of moneys paid out for **development and operations upon the lands only**. In paragraph IV “**actual cost and expenses of developing and operating said lands and leases**.” (Emphasis ours).

The agreement fails to furnish any certain guide to determine what was the intent of the parties as to expenses to be charged against Troy’s share of the production.

The charges contained in the statements rendered by Ohio (Exhibits “A,” “B,” “C,” “D,”) cover a wide range of expenses both on and off the lands, traveling expenses, percentages of expenses irrespective of whether such expenses ever incurred in developing and operating the lands involved, traveling expenses of employees and representatives of Ohio between various points in Montana and Wyoming, expenses incurred by Ohio as a convenience in its operating many other leases and lands in the Sunburst field showing that Ohio interprets the agreement as justifying all expenses incurred by Ohio in all of its operations in the area and not to be confined to “actual expenses of developing and operating the particular lands.” The interpretation placed by Troy and the plaintiffs restricts and limits the charges to be made against them.

The Operating Agreement was prepared by Mr. Gee, (R. 425, 555, 583) the attorney for Ohio at the time, and since the agreement is ambiguous and uncertain, parol evidence is admissible to show what was said and done at and prior to the signing of it and what the representative of Troy (Jones) understood what it meant and what Ohio believed Troy understood it to mean at the time.

The testimony of the witness as to the provision of the Operating Agreement, as same was finally written by the attorney for Ohio, which the attorney pointed out as having been inserted for the purpose of limiting the expenses chargeable to Troy and to meet Mr. Jones' objections to the "fifty-fifty" form of written agreement and the second form of written agreement theretofore submitted to him by the attorney, Mr. Gee, appears in Jones' deposition, (R. 422, 423, 431, 432), and it appears therefrom that Ohio's attorney particularly pointed out the clause of paragraph III of the Operating Agreement which reads, "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands." Ohio retained the forms of agreement objected to by Jones (Jones' Dep. R. 432) and returned the Operating Agreement which was finally signed (R. 432).

The cross examination of this witness by counsel for Ohio appears with reference to the signing of the agreement, and the circumstances thereof and

substance of the conversation relative to limitation of expense charges appear (ante at pages 19 to 34) herein. The substance of the testimony is that there was a limitation of expense chargeable against Troy, that Troy gave Ohio 5% of the production as covering operating expenses incurred after the wells were drilled and put into production, (R. 425, 426, R. 430, 431), that Troy was to be chargeable with 45% of the cost of drilling the wells, equipping same, installing and maintaining the equipment, placing the wells in a state of production, except the costs of the first well to be drilled which was to be a free well to Troy, and interest to be charged on the above enumerated charges other than the costs of the first well. Mr. Jones' testimony has support in the language of paragraphs III and IV (R. 19, 20) of the Operating Agreement, referring to expenses of **“developing and operating said lands for oil and gas purposes,”** (emphasis ours) that Ohio would account to Troy for 45% of the oil and gas “at the prevailing market price at the wells for said oil and gas” indicating a cut off of expenses chargeable after the oil and gas could be taken at the wells which would be at the top of the casing heads on the wells, that Troy would not be finally held or charged in any case beyond its “share or interest in the production and equipment from, in or upon said lands” (R. 20 ll. 8-11); that the monthly statements would show “actual cost and expense of developing and

operating said lands" (R. 20 ll. 20-24) and that the interest charges would be limited to monies advanced for "development and operations upon said lands" (R. 20 ll. 11-16).

The conduct of Jones in objecting to charges on behalf of Troy and plaintiffs after first statements rendered to Troy (R. 440, 472, 467, 462, 463,) and later to Inland and Potlatch, including the substance of the letter from Mr. Freeman to Ohio dated August 8, 1925, wherein, in paragraph 5, reference is made to the conversations testified to by Jones at the time the agreement was negotiated and the expense limitations discussed in this conversation (Exhibit "A" attached to defendant's answer corroborates Jones testimony).

In the letter from Ohio (Exhibit "B" of defendant's answer (R. 73, 84, 85) in answer to Mr. Freeman's letter in the fifth subdivision of paragraph "(5)" of such answer, referring to the conversation mentioned, no denial is made that such conversation occurred. The letter states "The representatives of the Ohio Oil Company who made this contract with your clients do not recall any conversation relative to making charges against Troy-Sweet Grass Oil Syndicate for the actual amount of expenses incurred on the lease itself, or as you say, within the four corners thereof" (R. 85 ll. 10-16). Here is presented a situation where the Ohio representatives were called upon for a definite admission or a denial but avoided

doing so by the old evasion "do not recall", and this at a time when Jones of Troy and Potlatch and Wilson of Inland had been objecting repeatedly to certain charges made by Ohio (R. 440, 447, 517, 518).

Jones' testimony, above discussed, is clearly within the statutory rules and rules of decision of the Montana Courts relative to interpretation of written agreements and admissibility of evidence to aid in such interpretation (ante pp. 17-37).

We respectfully submit that the Operating Agreement should be interpreted to limit the expenses chargeable to the 45% interest of Troy, Inland, and Potlatch, respectively, to the cost and expense of drilling the wells, equipping same, maintaining such equipment, and labor costs incident thereto, and placing said wells and maintaining same in a condition to make their production of oil and gas capable of being taken and paid for at the prevailing market price at the wells.

The testimony of T. P. Jones is admissible notwithstanding the deaths of A. M. Sellery, F. E. Hurley, John McFadyen, and T. B. Firmin.

When the deposition of witness Jones was taken counsel for defendants reserved certain objections to the anticipated testimony of the witness, among which objections were those which do not permit testimony as to conversations or transactions with a deceased agent or officer of defendant cor-

poration (R. 421) and when the deposition was admitted in evidence it was stipulated that same was admitted subject to all proper objections except as to the form of questions propounded to the witness (R. 175-186), except defendant waived objections from the standpoint of the best evidence rule, (R. 179, 180) as to plaintiffs Exhibits "2" (copies of Operating Agreement and Assignment attached), (R. 17-25), "26" (copy of letter from Freeman, Thelen and Frary to Ohio, dated August 8, 1925, pertaining to objections of Inland and Potlatch to expense charges being made) (R. 73-89) "27" (copy of letter from Ohio, in answer to letter from Freeman, Thelen and Frary, dated September 12, 1925, (R. 65-73), and "29" (copy of letter from Potlatch dated May 11, 1925, inquiring why it did not receive check from Ohio attached to Jones deposition).

Thus the question of admissibility of Jones' testimony relating to oral communications and transactions between the witness and the deceased agents and officers, above named, is presented for determination.

As heretofore shown the rule, whether state, federal, or equity, which favors admissibility of evidence is to be adopted by the Court in determining the question. (Rule 43 (a) Federal Rules of Civil Procedure).

Section 93-701-2 R.C.M. 1947, Sec. 10534, R.C.M. 1935, provides:

"All persons, without exception, otherwise than is specified in the next two sections, who, having

organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section 10508."

Section 93-701-3, Sec. 10535 R.C.M. 1935, in so far as pertinent provides:

"The following persons cannot be witnesses: * * *

4. Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communications between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation, except when it appears to the court that without the testimony of the witness injustice will be done."

The section excludes as witnesses only "parties or assignors of parties to an action or proceeding or persons in whose behalf an action is prosecuted" against the defendant corporation as to facts of direct transactions or oral communications between the proposed witness and the deceased officer or agent of the corporation.

Jones is neither a party nor an assignor of a party to the action nor a person in whose behalf the action is prosecuted.

The parties to the action are Gerlough, Hodgman, and Larson, Trustees of Inland, maintaining the action in behalf of the trust estate, and Potlatch, a corporation, maintaining the action in its own behalf.

The mere fact that a person may have an indirect or remote interest in the results of an action, such a stockholder or member in a corporation is not a party to an action or a person in whose behalf an action is prosecuted within such a statute.

New Jersey Trust, et., Co. v Camden Co.

58 N. J. L. 196, 33 Atl. 475,

Rust v Bennett, 39 Mich. 521,

Bank v. McGarrah,

(Ga.) 48 S. E. 393, following

Cody v. First Nat. Bank

(Ga.) 30 S. E. 281,

New York Life Ins. Co. v. Johnson,

(Ky.) 72 S. W. 762,

Johnson v. Fraternal Reserve Assn.

(Wisconsin 1908) 117 N. W. 1019,

The interest must be direct and certain, not remote or merely a possible contingency as the interest of a stockholder in a corporation.

Kyle v. Kyle,

(Iowa 1916) 157 N. W. 248,

Bates v. Carter Construction Co.,

(Pa. 1916) 99 Atl. 813,

Merriman v. Wickerhem,

(Calif. 1904) 75 Pac. 180.

To disqualify a person under statute as being one for whose benefit the action is prosecuted, only one

who is absolutely entitled to the results of the litigation and not to one who may ultimately receive same.

Irwin v. Moore,
15 N. Y. 432,

Freeman v. Spaulding,
12 N. Y. 373,

Furthermore, defendant waived any objection it might have to Jones' competency by setting forth, as Exhibits "A" and "B" attached to its answer the letter from Freeman, Thelen & Frary to Ohio, stating the details of the conversation between Jones and Hurley and the letter from Ohio to Freeman, Thelen & Frary referring to the same conversation and in Ohio waiving objection to the letters offered as Exhibits "26" and "27" of the attached to the Jones deposition, (R. 179-180) and it having permitted the introduction in evidence without objection the letter from Inland to Mr. Hurley dated September 22, 1923, (R. 309-372) which letters are included among those in plaintiffs' Exhibit "O" (R. 303) (R. 65-89).

These circumstances removed the disqualification.

Ellis v. Wadleigh,
182 Pac. (2) 49, 70 C. J. Sec. 484, pp. 368, 369.

Independent of the foregoing considerations, the decisions of the Supreme Court of Montana, construing section 10535 R. C. M., (supra) have consistently held it is discretionary with the Court to permit a witness to testify as to oral communica-

tions with the deceased person, deceased representative of a corporation.

Mosback v. Smith Brothers Sheep Co.
65 Mont. 42, 51, 210 P. 910,

Pankovich v. Little Horn Bank,
104 Mont. 394, 403, 66 Pac. (2) 765,

Wunderlich v. Holt,
86 Mont. 260, 283 Pac. 423.

Averill Mach. Co. v. Taylor
70 Mont. 70, 223 Pac. 918,

Roy v. King's Estate
55 Mont. 567, 179 Pac. 918.

The statute provides for the admission of the testimony if, as the Court in Pankovich v. Little Horn Bank, 104 M. 395, at page 403, says, "if it sufficiently appears from the record that without it an injustice might be done." The Court interpreting the present agreement is confronted with the interpretation of the agreement and is entitled under the statute (Sec. 93-401-17 Sec. 10521 R.C.M. supra) to be placed in the position of the parties at the time the agreement was made to determine what the intent of the parties was. Unless the testimony of Jones is admitted as to the facts existing at the time, the Court in construing the agreement might so interpret the agreement contrary to the true intent of the parties. Particularly where there is other evidence in the record corroborative of the claim of plaintiffs, but insufficient without the evidence objected to establish plaintiffs' claim as stated by the Montana Supreme Court in Wunderlich v. Holt, 86 Mont. 260, 283 Pac. 423.

In *Anderson v. Wirkman*, 67 M. 176, 215 Pac. 224, an action was brought by the widow to recover for the wrongful killing of her husband by the administrator of the killer's estate. She was the only eye witness of the killing and she (although a party to the action) was permitted to testify since her testimony was indispensable to show the killing was wrongful.

We do not believe Jones was disqualified as witness by Section 93-701-3 Sec. 10535 R.C.M. Consequently his testimony pertaining to acts and declarations forming part of the transaction in dispute and evidence of such transaction, to wit, intent of the Operating Agreement was admissible.

Section 10511 R.C.M. 1935,

McCrimmon v. Murray,
43 Mont. 457, 471, 117 Pac. 73,

Stagg v. Stagg,
96 Mont. 573, 595, 32 Pac. (2) 856,

Welch v. All Persons,
85 Mont. 114, 129, 278 Pac. 110.

McCrimmon v. Murray was an action to recover on an agreement for payment to plaintiff for information to be given defendant relative to a vein of ore in defendant's mining claim. Evidence of the acts and declarations of defendant relative to his estimate of the character and value of the vein while he was examining same was excluded as hearsay. The Supreme Court on appeal held such exclusion of evidence was error. The Court said in

referring to the exclusion of the evidence (43 Mont. 471):

“This was error. The examination was one of the series of steps leading up to the consummation of the contract, without the doing of which there would have been no contract.”

If Jones be deemed an incompetent witness, the court can consider with the other competent evidence in the case the fact that the acts and declarations of the parties constitute matter within the meaning of the statute (*res gestae*) in exercising discretion favorable to the admission of such evidence within the exception expressed in section 93-701-3 R.C.M. 1947, Sec. 10535, Subd. 4 R.C.M. (*supra* P. 50).

In view of the provisions of Rule 43 (a) Federal Rules of Civil Procedure, favoring admissibility of evidence, we respectfully submit that the Court has the discretion to admit the testimony of Jones in this case, even if incompetent as a witness.

The deposition of R. E. Wilson of Inland (R. 515-519) relates to conversations and communications with representatives of the Ohio and under the authorities heretofore discussed, his testimony and exhibits referred to are admissible. His testimony will be more fully considered in a subsequent subdivision.

The plaintiffs' action is not barred by the statutes of limitation or by laches.

Precedent to discussion of defendant's affirmative defenses of statutes of limitations and laches,

it is necessary to determine the legal relationship, rights, and obligations of the respective parties because same will determine in great measure the merit or lack of merit of the defenses of limitations and laches urged.

The pleadings and evidence present no dispute as to the following facts. Troy, the owner of oil and gas leases embracing 1,520 acres of land in Toole County, Montana, on June 15, 1922, made a written agreement for development and operation of the leased lands for oil and gas purposes with Ohio, and on the same date assigned by written instrument an undivided 55% interest in the said leases to Ohio in consideration of the assumption and performance by Ohio of the obligations specified in the agreement and which obligations, in brief, were that Ohio would operate the leased lands for oil and gas and market the production and, in the first instance, advance all monies for such purposes. Ohio obligated itself to account to and pay over to Troy 45% of the proceeds from the sale of oil and gas to Troy after first deducting from such proceeds certain stated expenses chargeable against Troy's share of such proceeds as specified in the agreement. (R. 5-9, 53).

On or about June 15, 1922, Ohio assumed possession, management and control of the lands and leases and thereafter purchased and appropriated oil from the lands until about January 31st, 1943, when it transferred its interest in the agreement

and in the oil and gas leases to The Texas Company (R. 8, 9, 53).

In the meantime, on January 1, 1923, Troy assigned (conveyed) an undivided 22½% interest in the aforesaid agreement as to one of the leases embraced in the assignment, known as the "Baker Lease" of 320 acres, to Inland and thereafter, about August 18, 1923, Troy assigned all of its remaining right and interest in the said agreement with Ohio and in the oil and gas leases involved to Potlatch, (R. 10, 11, 54). Clearly, the assignment and agreement between Troy and Ohio constituted a joint adventure by them. By the assignment they become tenants in common of the estate created by the various oil and gas leases which is held to be a "profit a prendre" by the decisions of the Supreme Court of Montana.

Homestake Exploration Corporation v. Schorregge,
81 Mont. 604, 614, 264 Pac. 388.

Section 67-312 R.C.M. 1947 Sec. 6682 R.C.M. defines an interest in common to be:

"An interest in common is one owned by several persons not in joint ownership or partnership."

Hochsprung v. Stevenson,
82 Mont. 222, 237, 266 Pac. 406.

Section 67-313 R.C.M. 1947, Sec. 6683 R.C.M. defines what interests are in common as follows: "Every interest created in favor of several persons in their own right, including husband and wife, is

an interest in common unless acquired by them in partnership for partnership purposes or unless declared in its creation to be a joint interest, as provided in Section 67-308 R.C.M. 1947, Sec. 6680, R.C.M. 1935.

A joint adventure is broadly defined as an "enterprise undertaken by several persons jointly, and more particularly as an association of two or more persons to carry out a single business enterprise for profit, or as a special combination of persons undertaking jointly some specific adventure for profit, without any actual partnership or corporate designation, or an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge."

Rae v. Cameron
112 Mont. 159, 114, Pac. (2) 1060.

In *Ivins v. Hardy* 120 Mont. 35, 179 Pac. (2) 745, the Court held that where two persons jointly purchased land and engaged in the ranching and livestock business for profit, each to share certain portions of the expenses of the operation, such persons were tenants in common of the land and joint adventurers in the operation of the ranches and the plaintiff, and one of the joint tenants, was entitled to an accounting from the other tenant. The Court said: "The joint venture between the parties was but the natural dealing between tenants in common for the development and use of the common prop-

erties under a plan mutually beneficial to the tenants in common," citing *Dunham v. Loverock*, 158 Pa., 197, 27 Atl. 990. Referring to the cited case the Court said: "There tenants in common entered into an agreement to drill an oil well on their land." A dispute arose over the cost of the well, one tenant in common claiming a balance due from the other and claiming the existence of a partnership. The Court pointed out that the agreement claimed to be a partnership "was an undertaking which was appropriate to tenants in common, since it would increase the product of the common property." The Court further said, "To be sure, there was undivided possession of the lease, but unity of possession is one of the distinguishing characteristics of a tenancy in common. There was contribution to the cost of operating the well or wells, but this could be compelled between tenants in common by bill or by account render. There was division of the product, but this was in accordance with the rights of the cotenants. Each had a right to share in the product in proportion to his interest in the estate."

See also: *Snider v. Carmichael*,
102 Mont. 387, 58 Pac. (2) 1004.

The situation between the parties in this case is similar to the situation of the parties in the above cited cases.

Section 63-1001 R.C.M. 1947, Sec. 8050 R.C.M. provides:

"A mining partnership exists when two or more persons who own or acquire a mining claim for

the purpose of working it and extracting the minerals therefrom actually engage in working the same."

We submit that by reason of the corporate character of Potlatch and Ohio and the trust character of Troy and the trust character of Inland, the relationship between them under the agreements and various assignments did not constitute any partnership relationship, mining or otherwise, between them at any time notwithstanding the Supreme Court of Montana has held that an oil well is a mine.

Mid-Northern Oil Co. v. Walker,
65 Mont. 414, 211 P. 353.

The fact that Troy and its assignees, by express provisions of the agreement, were not chargeable for losses beyond their interest in oil and gas production if the venture was not successful does not change their relationship as joint adventurers.

Orvis v. Curtiss,
157 N. Y. 657, 52 N. E. 690,

The relation between joint adventurers is fiduciary and each have the right to demand and expect from their associates utmost good faith and scrupulous honesty in all that relates to their common interests, and each is forbidden to so act that his personal interest would be hostile to the other. The relationship is in the nature of trusteeship.

Dexter & Carpenter, Inc. v. Houston,
(1927 C.C.A. 4th) 20 Fed. (2) 647,

Mills & Willingham, Oil and Gas,
p. 281, 282, sections 190, 191,
48 C. J. S. p. 849, section 24.

Where through breach of fiduciary duty a joint adventurer acquires more than his proper share under the agreement, he will be deemed a trustee for the benefit of his co-adventurer.

3 Bogert Trusts and Trustees,
Sec. 488, pp 127-130,

Wiley v. Wirbelauer,
116 N. J. Eq. 391, 174 Atl. 20.

Under the operating agreement Ohio, by reason of the confidence reposed by Troy, was given possession and control of the lands involved, and of the development and operation upon the lands of the oil produced and of the proceeds from the sale of the production. As a fiduciary it occupied a relation of trusteeship, owing the duty to correctly and honestly account to and deliver to Troy, Inland and Potlatch, respectively, their just share of such proceeds; and the burden at all times rested upon Ohio to show that it has performed its trust and the manner of its performance in detail.

Wooton Land & Fuel Co. v Ownbey
265 Fed. 91,

Dexter & Carpenter, Inc. v. Houston,
(C.C.A. 4th) 20 Fed. (2) 647,
1 C.J.S. Section 39, p. 679.

Ohio is charged with failure to pay over to plaintiffs a portion of their rightful share of the proceeds from sales of oil and retain such proceeds notwithstanding demands made for a correct accounting for such proceeds and payment thereof.

Under such circumstances plaintiffs are entitled to maintain the present action for an accounting.

Kilbourn v. Sunderland,
130 U. S. 503, 32 L. ed. 1005,

Van de Putte, Adm. et al. v. Texas Pac. Coal &
Oil Co.,
35 Fed. Supp. 794,

Pedowski v. Southern Mich. Fruit Assn.,
(1933 Mich.) 246 N. W. 58

1 C. J. S. section 14, pp 645, 646.

The testimony of Jones, Wilson, and Gerlough and correspondence (Plaintiffs' Exhibit "O" R. 303-368) show objections being made for improper debits and lack of proper credits to plaintiffs through the years. The letter from Attorneys Freeman, Thelen and Frary to Ohio, (R. 65-73) setting forth objections to correctness of the statements rendered, the testimony of Jones as to the intent of the agreement and its violation, clearly apparent when compared with the statements rendered by Ohio, (Plaintiffs' Exhibits "A" and "B" filed as original documents from from the trial court by order (R. 611, 612) received in evidence) disclose improper charges made; and the express promise of Mr. McFayden, manager, that all errors would be finally corrected at the time he requested Jones not to bring suit, Jones' compliance (R. 447-449) and then the sale made by Ohio to Texas, without notice of any kind to Inland or Potlatch (R. 229-230), disclose a situation where Ohio breached its trust and entitles plaintiffs to a correct and

honest accounting by Ohio, (Cases cited ante pp. 56-62.

Every person who voluntarily assumes a relation of personal confidence to another is deemed a trustee within the provisions of Chapter 144, Revised Codes of Montana, 1935.

Sec. 86-205 R.C.M. 1947 Sec. 7882 R.C.M. 1935.

In all matters connected with his trust a trustee is bound to act in the highest good faith and may not obtain any advantage therein over his beneficiary by the slightest adverse pressure of any kind.

Sec. 86-301 R.C.M. 1947, Sec. 7888, R.C.M. 1935.

Every violation of the provisions of the preceding sections is a fraud against the beneficiary of the trust.

Sec. 86-307 R.C.M. 1947, Sec. 7894, R.C.M. 1935.

One who gains a thing by fraud, mistake, the violation of a trust, or other wrongful act, is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

Sec. 86-210 R.C.M. 1947, Sec. 7887, R.C.M. 1935.

Obviously by virtue of the Operating Agreement and the above provisions of the statutes the defendant was a joint adventurer and chargeable as a trustee.

Under the laws of Montana and other jurisdictions neither the defense of the statute of limitations nor of laches is available to a joint adventurer or a trustee in an action brought by a joint adventurer or beneficiary for an accounting until after termina-

tion of the joint venture or the trust or the repudiation of the trust by the trustees.

Opp. v. Boggs,

Mont. 193 Pac. (2) 379,

34 Am. Juris. 290, section 374,

48 C. J. S. section 12, pp. 850, 851,

State v. Rorabeck,

111 Mont. 320, 325 108 Pac. (2) 801.

General Pet. Corp. v. Dougherty,

(C.C.A. 9th) 117 Fed. (2), 529, 540.

Merritt Oil Corp. v. Young,

(C.C.A. 10th) 43 Fed. (2) 27, Pars. (5-7)
pp. 31, 32.

48 C. J. S. section 12e, pp. 852, 853,

In case of a technical trust the statute of limitations does not run between the trustee and cestui que trust as long as the trust subsists, the possession of the trustee being the possession of the cestui que trust.

53 C. J. S. subd. 9., pp. 954, 955.

State v. Rorabeck,

111 Mont. 320, 108 Pac. (2) 801.

Ohio at no time repudiated the agreement but continued thereunder to January 31, 1943, receiving its benefits and the profits on the operation besides the 8% interest profit charged under the contract against Troy and successors. Having received the benefits of the agreement, it equitably should bear the burdens incident thereto.

Sec. 49-113 R.C.M. 1947, Sec 8750 R.C.M. 1935.

Defendant's second and third affirmative defenses plead the five year and eight year statutes

of limitations, which refer to sections 9030 and 9029 R.C.M. 1935. (Now sections 93-2604 and 93-2603 R.C.M. 1947). In view of the decisions heretofore cited (ante pp. 63, 64) to the effect that between joint adventures the statute does not commence to run until the termination of the joint venture and as to a trustee and beneficiary the statute does not commence until there is a clear repudiation of the trust by the trustee and such fact brought to the knowledge of the beneficiary, the statutes have not barred the action. Ohio retained sole possession and control of the lands and operated under the agreement until January 31, 1943. Assuming, for argument only, the sale at that time to Texas Co. constituted a repudiation of the trust by Ohio and also constituted a termination of the agreement as to plaintiffs, neither the five year statute nor the eight year statute bars the action since this suit was started in March, 1947, or within four years and forty six days from the date of sale and within about four years after plaintiffs received notice of the sale to the Texas Co. when in March, 1943, they received statements from the Texas Co. covering operations for the month of February, 1943. (R. 229-230, Gerlough).

Adverting to the question of laches, the answer of defendant fails to allege facts constituting laches on the part of the plaintiffs. The allegations of the answer are substantially that F. E. Hurley died July 27, 1928, and A. M. Sellery died February

14, 1927, and plaintiffs did not commence this suit until March 18, 1947. These facts do not constitute laches. The Montana and Federal Courts are in accord that where an action is commenced within the period of the statute of limitations, prejudice will not be presumed and that the party asserting laches must show substantial prejudice which prevents justice being done.

Johnson v. Kaiser, et al,
104 Mont. 261, 65 Pac. (2) 1179,

Cox v. Hall,
54 Mont. 154, 168 Pac. 519,

Brundy v. Canby,
50 Mont. 454, 148 Pac. 315,

Parchen v. Chessman,
49 M. 326, 142 Pac. 631.

Apparently defendant erroneously concludes that the deaths of Messrs. Sellery, Hurley and MacFadyen were sufficient to establish laches. Such is not the rule.

Earle, Admr. v. Myers,
207 U. S. 244, 52 L. ed. 191,

Townsend v. Van der Werker,
160 U. S. 171, 40 L. ed, 383,

Nave-McCord Mercantile Co. v. Ranney,
(C.C.A. 8th, 1928) 29 Fed. (2) 383,

Oswald v. Camac,
(C.C.A. 5th, 1933) 65 Fed. (2) 610,

Porter v. Van den Burgh,
(Calif) 99 Pac. (2) 265,

Consolidated Placers v. Grant,
(N. M.) 151 Pac. (2) 48,

Pratt v. Shell Pet. Corp.
100 Fed. (2) 833 certiorari denied
306 U. S. 659, 83 L. ed. 1056.

Earle v. Myers (*supra*, 207 U. S. 244, 52 L. ed. 191) was an action by the administrator of the estate of a deceased joint adventurer against the surviving co-adventurer for an accounting for his share of the profits arising out of the venture being withheld by the survivor. Defense of laches interposed based on long lapse of time and the death of a party to the joint adventure agreement. The United States Supreme Court held that the delay and death of the party did not constitute laches. Accounting allowed.

In *Townsend v. Van der Werker*, 160 U. S. 171, 40 L. ed. 383, the Supreme Court held that the death of a party to an agreement whereby her testimony was lost was not conclusive of laches in an action to establish and enforce a trust and for accounting. The Court (40 L. ed. 387) said: "The delay is sufficiently accounted for by the intimate personal relations that had always existed between plaintiff and Mrs. Marvin and the unlimited confidence he had reposed in her." In addition to the confidential relations existing between plaintiff and the deceased she had promised the plaintiff she would make settlement of the existing matters between them and by reason thereof, plaintiff neglected to bring suit in her lifetime. The Court held that the same diligence could not be expected

of plaintiff under such circumstances as would have been required if the plaintiff had been dealing with a stranger.

In *Nave-McCord Merc. Co. v. Ranney*, 29 Fed. (2) 383, an action was brought for enforcement of a trust and accounting for value of good will on a sale of assets by the officers of a corporation to another corporation in which such persons were also officers. There was a delay of over twenty-four years from the time of sale in the commencement of the action. During the interim some of the parties to the original transaction had died. In denying the defense of laches and advertent to the fiduciary relations existing between the parties the Court held that laches is dependent upon the circumstances in each case and the doctrine is to assist justice, not defeat it. The Court said (29 Fed. (2) p. 391):

“It is, of course, unfortunate that the men who were the most concerned with this matter, and who could have testified of their own knowledge as to what was said and what was done, have nearly all passed from the scene; but that is a matter to be considered in weighing the evidence and determining the facts. *Townsend v.*

Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. Ed. 383.

The trial court was right in holding that the doctrine of laches should not be invoked in this case.”

The case of *Oswald v. Camax*, 65 Fed. (2) 610, was for an accounting brought by a surviving joint

adventure against the executrix of the will and widow of a deceased co-adventurer to recover a share of the profits of the enterprise withheld by the deceased. The Court held that the death of the co-adventurer did not establish laches and particularly so in the case, since records of the joint account of the parties were available and the statute of limitations had not run. Accounting held proper remedy.

In denying the defense of laches the California appellate court held that death of a witness does not establish laches where other evidence consisting of books of account and credible evidence support findings and judgment for the plaintiff.

Porter v. Van den Burgh,
(Calif.) 99 Pac. (2) 265.

In Brooks v. Clintsman, 98 S. E. 742, the Supreme Court of Virginia held that death of a party does not constitute laches even though such party was the one who perpetrated the fraud by changing the name of the grantee in a deed.

In the instant case the original statements of the accounts between the parties are in evidence. Mr. Hurley's and Mr. Sellery's deaths cannot be attributed to plaintiff's as the cause thereof. Such events are hazards incident to life. The plaintiffs made their objections at times prior to the deaths of such persons and if these persons were alive, they could not contradict the testimony of witness Jones for the reason that in August, 1925, the at-

tention of Messrs. Hurley, Sellery, and Gee was directed to Mr. Jones' statement concerning the conversations and statements between the parties at the time of making the agreement, and all these persons stated was that they did not recall the conversations. (Letters of Freeman, Thelen and Frary and Mr. Firmin of Ohio, of which copies are attached to the answer of Ohio in this cause (R. 65-89) and referred to in deposition of A. M. Gee, (R. 568, 569) wherein he states he conferred with Mr. Firmin when the letter of September 12, 1925, was written to Messrs. Freeman and Thelen wherein it is stated, "The representatives of the Ohio Oil Company who made this contract with your clients do not recall any conversations relative to making charges against Troy-Sweetgrass Oil Syndicate for the actual amount of expenses incurred on the lease itself, or as you say, within the four corners thereof." In the deposition of A. M. Gee, in his answer to defendant's direct interrogatory No. 13 relative to the statement in Jones' deposition (R. 431) as to the terms, he specified he would make a deal with Ohio, the witness said, among other things, (Gee deposition, R. 559 lines 16-20) "If any such conversation had been indulged in, I am certain that I would have remembered it because of its most unusual character. I have no recollection whatsoever of such demand." Hence the deaths of Messrs. Hurley and Sellery did not prejudice defendant since they have in evidence Mr. Gee's

testimony to the above effect. Furthermore, the correspondence between the parties relating to the improper charges and other errors in statements rendered has been available and received in evidence (Depositions of Jones, Wilson, and plaintiffs' Exhibit "O", R. 304, 65-89).

Neither the pleadings nor the evidence support defendant's plea of laches.

On the contrary, the delay has benefited the defendant. It has had the use of the money represented by the alleged improper charges without interest through the years of the operation, although the plaintiffs were charged 8% interest on proper and improper charges, both, by Ohio until their share of the production paid the amount of such charges.

The plaintiffs in 1925 had retained attorneys to enforce their right of recovery for improper charges. Subsequent to the correspondence between the said attorney and Ohio in 1925, a meeting was held of the stockholders of Potlatch in the year of 1926, and after such meeting, Jones had a conversation pertaining to the Operating Agreement with Mr. John McFayden (who was general manager of operations in the Rocky Mountain region, including the lands involved in the agreement) and told Mr. McFayden that "if he didn't correct these things and make an accounting, we would have to enter suit against the Ohio Oil Company." Mr. McFayden replied. "Don't start no suit, because

the Ohio Oil Company is responsible and reliable, and eventually in the final account we will fix this thing up and pay you anything that was over-charged against you. You can rest assured of that. The Ohio Oil Company is responsible and reliable." He said, "I will use my efforts to see that it is brought to a head without a suit." (Jones' Deposition, R. 448).

Mr. Jones communicated the conversation with the directors of the different companies and as a result of Mr. McFayden's statement, no suit was brought. (Jones deposition, (R. 448, 449). Witness Gerlough corroborated Jones' testimony of having told the Trustees of Inland in 1926 or 1927 of the above mentioned conversation with Mr. McFayden. (R. 233-237).

Notwithstanding the death of Mr. McFayden, Jones' testimony is admissible under the authorities herein above presented on the admissibility of Jones testimony concerning the conversations had at the time of making the agreement and we respectfully refer the Court thereto (Ante pp. 48-56).

In view of the foregoing promise of the general manager, Mr. McFayden, the plaintiffs' delay in suing is excused and defendant is estopped to assert defense of laches and the statutes of limitations.

The pertinent principles are stated as follows:

Matters of explanation or excuse for delay in maintaining suit in equity vary, such as a promise

to satisfy the complainant's claim, an intimate or confidential relations between the complainant and the person whose conduct gave rise to the claim, and delay caused by the Defendant's conduct or that delay is attributable to the acts of Defendant.

19 Am. Jur., Sec. 503, p. 348.

It is established by the overwhelming weight of authority that the equitable doctrine of estoppel in pais is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations, and that a debtor may by his representations, promises, or conduct, be estopped to assert the statute where the elements of estoppel are present. Concisely stated, parties may by their words or conduct estop themselves from pleading limitations. The doctrine of estoppel to rely on the defense of limitations is entirely independent of statutes providing for the suspension of the statute by an acknowledgment or new promise, and will not be applied except where it would be inequitable to refuse to apply it.

34 Am. Jur. Sec. 411, pp. 323, 324,

Irregular practices on the part of a defendant in delaying the institution of an action estops him to assert the running of the statute of limitations pending such delay. The fact that the plaintiff has been prevented by the defendant from commencing action within the period of limitations operates to estop the defendant from pleading the statute of limitations.

34 Am. Jur. sec. 413, pp. 325, 326.

Opinions of court sometimes contain broad language which indicates that any conduct of the defendant which induces inaction on the part of the plaintiff whereby suit is delayed beyond the limitation period will estop the defendant from relying upon the statute of limitations. It has been said that any agreement whereby the claimant is lulled into security and thereby delays action creates an estoppel, and bars the debtor from relying on the statute of limitations. * - - Moreover, an estoppel to set up the defense of limitations may rest on necessary implication as well as upon an express stipulation, and it need not be evidenced by any writing.

34 Am. Jur. sec. 413, p. 325.

A request not to sue, however, when coupled with other circumstances such as a promise to pay the claim or a promise not to plead the statute of limitations, estops the debtor to set up the statute.

34 Am. Jur. Sec. 419, p. 331.

Matters of explanation or excuse for delay in maintaining suit in equity vary, such as a promise to satisfy the complainant's claim, an intimate or confidential relation between the complainant and the person whose conduct gave rise to the claim, and delay caused by the Defendant's conduct or that delay is attributable to the acts of Defendant.

19 Am. Jur. Sec. 503, p. 348.

Duncan v. Dazey,
(Ill. 1925) 149 N. E. 495.

In *Dexter & Carpenter, Inc. v. Houston*, 20 F (2) 647 (C.C.A. 4th), an action for accounting between joint adventurers, the court held the obligation of utmost good faith and scrupulous honesty between joint adventurers within the scope of the enterprise is in the nature of a trusteeship and that where a promise to make an adjustment of the claim was made by defendant to plaintiff and he failed to do so he may not rely upon the defense of laches since he held out a promise that was not fulfilled and which was accepted by the plaintiff.

R. E. Wilson, president and manager of Inland until sometime in 1926, discussed with Mr. John McFayden, a manager of Ohio and Mr. Yealy, representative in the area, when the monthly statements from Ohio commenced coming in, charges appearing in the statements and which the trustees did not agree to as they were not in the verbal agreement nor "up to the contract." Wilson was referred to the auditing department and Mr. McFayden said the Ohio Company was a reliable company and whatever was wrong would be made right, they would live up to contract. (Wilson Deposition, they would live up to contract. (R. 515-521, 539-542). Later Inland retained Freeman, Thelenson), got sick and left to go ahead and sue if they couldn't make a settlement. (Wilson deposition, (R. 520).

The number of authorities may be multiplied many times which hold delay alone does not bar an action between fiduciaries in absence of substantial prejudice. We submit the following decisions, additional to those heretofore cited, embracing delays, respectively, from nine years to thirty years holding laches not established.

McIntyre v. Pryor, (9 years)
173 U. S. 38, 43 L. ed. 606,

De Noble v. Galardo Y. Seary (over 35 years)
223 U. S. 65, 56 L. ed. 353,

St. Louis Car Co. v. Bull Co. (30 years)
25 Fed. Supp. 244, aff'd. 99 Fed. (2) 999.

Gunton v. Carroll, (30 years)
101 U. S. 426, 25 L. ed. 985,

Southern Pac. Co. v. Bogert (25 years)
250 U. S. 483, 63 L. ed. 1099,

Hill Exec. v. Frank,
118 Mont. 235, 165 Pac. (2) 1006,

Mott v. Iossa, (13 years after attaining majority)
(N. J. Eq.) 181 Atl. 689, at 693.

Plaintiffs' action is not defeated by alleged accounts stated as no account was stated between the parties at any time.

Defendant's answer substantially charges that because monthly statements were furnished by Ohio to plaintiff and their predecessor and payments made to plaintiffs respectively when a credit balance was shown, such rendition of statements and retention of monies resulted in an account stated each month by the plaintiffs, respectively, and

their predecessor in interest, and by reason thereof plaintiffs are estopped to maintain this action. (Defendant's Fourth Affirmative Defense, Answer, (R. 59-65).

This defense is wholly without support by the evidence. The answer admits that prior to August 5, 1925, plaintiffs made protests and objections to certain charges contained in the monthly statements. He is an express admission by defendants that objections had been made by plaintiffs to "certain charges" in the statements corroborating the testimony of Jones, Wilson, (above) to such effect. (Answer, par. IX, (R. 55, Complaint, par. XIII, (R. 13, 14).

Although the answer alleges that no objections concerning the correctness of the statements were made by plaintiffs after the correspondence between the attorneys for plaintiffs and Ohio (Firmen) the correspondence submitted with Wilson deposition (R. 546-549, and in part duplicated in plaintiffs' Exhibit "O" (R. 304-368) show many objections by plaintiffs, respectively, to correctness of statements and acknowledgment of errors by defendant and promised corrections.

An account stated is an agreement between the parties, express or implied, that all items are correct which agreement has the force of a contract. Where assent to correctness is to be implied from retention of statements, **the statements must have been retained an unreasonable length of time without objection.**

Baldwin v. Silver,
58 Mont. 495, 193 Pac. 750,

O'Hanlon v. Jess,
58 Mont. 417, 193 Pac. 65, 14 A. L. R. 237,

1 C. J. S. sec. 21, p. 703,

1 C. J. S. sec. 25, p. 704.

It is not an account stated if the evidence shows that the party to whom rendered objected to the correctness of the account or previous protests had gone unheeded.

1 C. J. S. 37, p. 716.

Nor is it an account stated where **the parties do not treat it as a final adjustment.**

1 C. J. S. sec. 38 p. 717

Any fact tending to negative assent to the statement of account may be shown rebut the presumption of correctness of the account by retention such as showing that the determination of the correctness of the account would be had at a later date.

1 C. J. S. sec. 37, p. 716.

To constitute an account stated each party must understand the transaction as a final adjustment of respective demands.

Daube v. United States,
289 U. S. 597, 77 L. ed. 973,

Sterns Co. vs. U. S.
291 U. S. 54, 78 L. ed. 647,

1 Am. Jur., sec. 23, p. 277.

The act that payments accompanying the statements are retained is not conclusive evidence of an account stated.

Hanson v. Fresno Jersey Dairy Co.,
(Calif. Sup. Ct) 31 Pac. (2) 359,

Jensen v. Cloud,
107 Mont. 593, 88 Pac. (2) 36,

Hatter v. Interocean Oil Co.
(Okl.) 78 Pac. (2) 392, 116 A. L. R. 729,

Moore v. Bartholome Corporation,
(Cal. App.) 159 Pac. (2) 436.

In Hansen v. Fresno Jersey Dairy Co. (Calif. Sup. et.) 31 Pac. (2) 359, supra, statements showing amount claimed due were rendered monthly and checks for the amounts accompanied the statements and were retained and cashed, based on a written agreement covering a period of time. The party receiving the statements and checks claiming errors in the statements brought an action to recover monies due him on account of the errors plus certain damages. Defense of account stated interposed. The court held the facts did not constitute an account stated and said, (31 Pac. (2) 362)

“Although generally accounts are rendered by the creditor to the debtor, it is conceivable that pursuant to a relationship such as existed between these parties, accounts are expected to be rendered by the party by whom the goods are received and from whom payment is due. Moreover the contract provides for accounts to be rendered by the defendant. The theory of an account stated is that it becomes a contract between the parties for payment of the amount computed to be due without proof of the specific items included therein. *Auzerias v. Naglee*, 74 Cal. 50, 64, 15 P. 371. **Therefore an element essential to render the account stated is that it receive the assent of both parties, but the assent**

of both parties, but the assent of the party sought to be charged may be implied from his conduct. *Crane v. Stansbury*, 173 Cal. 631, 636, 637, 161 P. 7; *Hendy v. March*, 75 Cal. 567, 17 P. 702; *Auzerias v. Naglee*, supra; 1 Cor Jur. p. 685 et seq. Accordingly an account fails to become stated when the essential element of assent is lacking; and assent is not present when proper objections are made by the party sought to be charged. *Klein-Simpson Co. v. Hunt, Hatch & Co.*, Cal. App. 625, 633, 225 p. 14. Ordinarily an account stated is an unperformed promise or agreement to pay the amount shown to be due. However, acceptance of payment of the amount shown to be due on an account rendered may render it an account stated, **but it is essential to constitute the transaction an account stated that such payment be accepted without objection.** 1 Cor. Jur. 689. There is evidence in the record that, at the time the reduction of August 1, 1930, was announced and subsequently during at least a portion of that time the defendant's statements of account and checks were received, the plaintiff personally and through the Dairymen's League, of which he was a member, protested the reduction made by the defendant as arbitrary and not in accordance with the terms of the contract." (Emphasis ours).

The Oklahoma Appellate Court in *Hatter v. Interocean Oil Co.* 78 Pac. (2) 392, 116 A. L. R. 729, **acceptance of monthly payments of oil proceeds and statements rendered under an oil lease but objections made did not establish an account stated.**

In *Moore v. Bartholome Corporation*, 159 Pac. (2) 436, statements were rendered and payments accepted over a period of years for oil royalties. Action was brought to recover the correct amount

of royalties due. Defense "account stated". The California Court held that a debt predicated upon an express contract cannot be made the basis of an account stated.

See also:

Keith, Admr. v. Rust Land & Lumber Co.
(Wis. 1918) 167 N. W. 432.

The rule of the case of Van de Putte, Admr. et. al. v. Texas Pacific Coal and Oil Company, 35 Fed. Supp. 794, we believe, conclusively demonstrates defendant's plea of account stated may not be allowed. The Court held that where statements are rendered by a company over a long period and objections made thereto by the other party, the transactions do not establish an account stated.

Under the rules of the preceding authorities cited, it is necessary that in order to constitute an account stated there must be an intention to strike a balance between the parties and that the parties intend such balance to be a final settlement of the transactions to which they relate, and that any evidence tending to show that same was not intended to be such final adjustment by the parties is admissible in determining whether an account was stated by the parties.

The evidence clearly demonstrates that none of the parties intended the monthly statements as striking a balance and treating same as final adjustments of the matter to which each statement embraced, but that such statements merely related

to continuing current unsettled accounts between the parties and the items therein were subject to changes, additions, and corrections at all times. An examination of all the original statements applicable to the operation furnished to Troy, Inland and Potlatch (Exhibits "A", "B", "C" and "D", transmitted to this Court from the trial Court and also the correspondence between the parties conclusively proves this fact. The following examples illustrate the intent and practice followed:

In the first statement rendered to Troy, September 30, 1922, drilling costs were charged on the Irving Baker Well No. 1, \$1,098.92, inclusive of 8 percent interest and 10 percent overhead. This well was a free well and no charges were to be made for drilling same. In the same statement is included a charge of \$84.36 against a Cora Phillips well. In the October 31, 1922 statement the same well (free well, Baker No. 1) was charged \$363.63 plus interest and overhead and included a fuel charge of \$189.00. In this statement Ohio corrected the charge on the Cora Phillips well for the preceding month and credited that well with \$58.26. In the November 30, 1932, statement the Baker well (free well) was charged with \$1,915.10 plus interest and overhead and was credited back with a correction in the sum of \$6.75 on the error of the charge for fuel oil charged on the October statement against the lease. The December 31, 1922 statement charged the Baker lease (free well)

\$2,245.79 plus interest and overhead, and in the January 31, 1923 statement a charge against the Baker lease (free well) of \$4,992.32 plus interest and overhead, and in this statement the Baker farm was credited back \$145.31 for equipment erroneously charged for pipe in the November and October, 1922 statements. In the February 23, 1923 statement Baker Farm was charged with \$3,267.96 and credited with an error in charge of 1252 feet of pipe, \$1,053.84, which had been charged against the lease in the previous months.

Examination of all the statements rendered to Troy shows corrections of prior statements. These statements are identified in evidence as Plaintiffs' Exhibit "C". For example, one of the additional errors corrected in the Troy statements is that Troy was charged with various amounts connected with the Baker lease, and in the May 31, 1923 statement Ohio credited Troy with over \$18,000.00 as Inland's proportion of the Baker Farm expense from June 15, 1922.

Then in the months of the year 1923 to October, inclusive, the statements theretofore rendered containing charges made against the Baker No. 1 well (free well) upon the operating account between the parties were corrected by crediting to the parties the cost of that well in the current operating account.

Although the agreement and assignment were entered into June 15, 1922, no monthly statements

contained any charge for Sunhio Water plant until subsequent to May 1925, Exhibits "A", "B", "C" and letter of May 11 and May 28, 1925, (R. 334, 335) all of such expense being theretofore charged to Ohio solely and appellants had been charged monthly for water during all the prior period, conclusively establishes Ohio itself never considered the monthly statements as accounts stated between the parties, and that up to that time Ohio's understood the contract as interpreted by Jones.

Other corrections appear in entries on the majority of the above mentioned statements appearing in Plaintiffs' Exhibits "A", "B", "C". This forcibly establishes the fact that each statement rendered was not intended nor assented to by the parties as striking a balance each month and a final agreement that the items were correct and that the balance shown was to be paid to Ohio.

The burden of proof to establish an account stated as well as the defenses of laches and statutes of limitations by a preponderance of the evidence rested upon Ohio. We respectfully submit it has failed in this respect.

Judgment in favor of plaintiffs for an accounting by defendant is warranted by the pleadings and evidence in the action.

The record in this action establishes that:

(a) Troy, Inland, Potlatch, and Ohio, during the period of operations under the Operating Agreement, were, respectively, fiduciaries;

(b) Ohio obtained properties and monies in which the parties had interests under the Operating Agreement;

(c) Ohio is charged with failure to correctly account and pay over the shares of the monies which plaintiffs claim and that demand for full final accounting therefor has been made by plaintiffs, and Ohio has failed to so account;

(d) The evidence shows generally prima facie improper charges made by Ohio, failure to give correct credit for the prevailing market price of oil at the wells, and that an accounting is proper and necessary to determine the amount owing to the plaintiffs. We refer the court to authorities pertaining to rights and obligations of fiduciaries at pages 56 to 64 ante.

Existence of any confidential or fiduciary relations is sufficient to invoke jurisdiction of equity in accounting.

Rivoli Drug Co. v. Lynch, (C.C.A. 9th, 1931)
50 Fed. (2) 536.

We respectfully submit that the judgment in favor of appellee should be reversed and the trial court be directed to order an accounting by it to appellants as to operations pertinent to the Baker lease as prayed by the appellants complaint.

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In the
United States Court of Appeals
For the Ninth Circuit

No. 13010

POTLATCH OIL & REFINING COMPANY, A CORPORATION,
AND JEAN P. GERLOUGH, STANLEY H. HODG-
MAN AND ROY E. LARSON, AS TRUSTEES OF THAT
CERTAIN TRUST KNOWN AS INLAND EMPIRE OIL AND GAS
SYNDICATE, A COMMON LAW TRUST,

Appellants,

vs.

THE OHIO OIL COMPANY, A CORPORATION,

Appellee.

BRIEF OF APPELLEE.

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No. 13010.

In the

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POTLATCH OIL & REFINING COMPANY, A CORPORATION, AND JEAN P. GERLOUGH, STANLEY H. HODGMAN AND ROY E. LARSON, AS TRUSTEES OF THAT CERTAIN TRUST KNOWN AS INLAND EMPIRE OIL AND GAS SYNDICATE, A COMMON LAW TRUST,

Appellants,

vs.

THE OHIO OIL COMPANY, A CORPORATION,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The following statement of the case differs in some respects from that set forth in appellants' brief. Because it is believed these differences will become at once apparent to the court, no particular references to or emphasis upon controverted facts will be made herein. There is no dispute as to jurisdictional facts. This is a civil action between citizens of different states, and the matter in controversy exceeds the sum of \$3,000 exclusive of interest and costs.

This action was filed on March 18, 1947, for an accounting and to recover money allegedly due appellants as a result of operation by appellee of oil and gas leases owned jointly by appellants and appellee.

A written agreement dated June 15, 1922, governing said operation was entered into by and between Troy-Sweet Grass Oil Syndicate, a common law trust, hereinafter called "Troy," as First Party, and The Ohio Oil Company, a corporation, hereinafter called "Ohio," as Second Party. On the same date Troy assigned to Ohio an undivided 55% interest in and to the oil and gas leases described in said agreement. Ohio agreed to drill a free well, and on July 5, 1922, entered into possession of the leased lands and completed a commercial gas well thereon on September 18, 1922, and a commercial oil well on January 27, 1923. The pertinent provisions of the agreement (which appellants have unsuccessfully sought to vary and contradict by parol testimony) are as follows:

"III. In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and as is consistent with good business management. It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part Forty-five (45%) per cent thereof. Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) per centum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof. The said party of the second part shall be reimbursed by the said party of the first part solely from the first party's proportion of the oil and gas produced and sold from said land. Application from

proceeds from sale of said oil and gas will be made to the credit of the first party's account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The party of the second part shall be entitled to and shall charge the party of the first part eight (8) per centum interest upon all moneys so advanced for the development and operations upon said lands for the account of the interest of the first party's until the same shall have been paid out of the proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production.

"IV. The party of the second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expenses of developing and operating said lands and leases and will remit monthly to the party of the first part all proceeds of the oil and gas sold from the interest of the first party over and above the amount necessary to reimburse the party of the second part for expenditures made by it for the account and interest of the party of the first part.

"V. The party of the first part through its duly authorized agents or representatives shall at all reasonable times have access to the buildings, lands and property hereinabove for the purpose of examining the operations thereon and the production therefrom, and at all reasonable times during business hours shall have the right to examine the books and records of the party of the second part insofar as they pertain to the operations conducted under this agreement.

"* * *

"The terms and conditions of this agreement shall extend to and be binding upon the heirs, administrators, successors and assigns of the parties hereto." (R. 19, 20, 21) (Emphasis above and elsewhere in this brief added unless otherwise indicated.)

On January 1, 1923, Troy assigned a 22½% interest in the "Baker Lease" to appellant, Inland Empire Oil and Gas Syndicate, hereinafter called "Inland." On August 18, 1923, Troy assigned to appellant, Potlatch Oil and Refining Company, hereinafter called "Potlatch," Troy's remaining 22½% interest in the "Baker Lease," together with all of Troy's interests in all of the other leases described in said agreement. The monthly statements showing the actual costs and expenses of developing and operating said lands and leases were made by Ohio to Troy commencing in August, 1922, and thereafter until Troy assigned to Inland and Potlatch, respectively. After Inland and Potlatch acquired their interests, such monthly statements were respectively made to them. For those months in which the income from the lands and leases exceeded all costs and expenses of developing and operating said lands, the statements were accompanied by Ohio's check under transmittal vouchers which had printed thereon "For payment of following items." Each voucher recited the date and number of the statement, the amount of the remittance, and that the check was either (1) "In full settlement for the amount due you for the net earnings of your part interest holdings as per our Bill No. _____, dated _____," or (2) "In payment of our Bill No. _____, dated _____." (R. 213)

All of the checks and vouchers were currently received by appellants, the checks cashed and the moneys retained. Periodically through the years appellants were requested to examine carefully the statements and to report any differences to Ernst & Ernst, auditors making an examination of Ohio's statements, specifically stating that "If no differences are reported to our auditors, this statement will be considered correct."

No written objections or complaints of any character are

to be found in the files of Ohio from Troy as to any of the charges made under said agreement. Troy was dissolved on July 18, 1925. (R. 387)

On September 11, 1923, Inland complained to Ohio that "overhead expenses" and other charges were improperly included in the monthly statements. By letter of September 22, 1923, Ohio flatly rejected Inland's claims. (R. 309)

On July 17, 1925, appellants' attorneys wrote Ohio objecting to the nature of the charges made, requesting corrections and proposing a conference between Inland, Potlatch and Ohio for the purpose of discussing the items with reference to which there was a difference of opinion. (R. 336)

On July 21, 1925, Ohio's general counsel responded to appellants' attorneys in part as follows:

"While we feel that the charges were carefully prepared and are entirely justified, representatives of the company will be glad to meet you and discuss with you fully and frankly any items your companies are complaining of. To that end, I am sending a copy of this letter to Mr. F. B. Firmin, the Cashier of the company at Casper, Wyoming, who is familiar with the entire matter, and I am suggesting that he arrange a conference with you at such time and place as may be found mutually agreeable." (R. 339)

On August 7, 1925, the conference was held at Shelby, Montana, and appellants' attorneys agreed to set forth in writing the specific objections and protests made by Inland and Potlatch.

On August 8, 1925, appellants' attorneys wrote Ohio as agreed. (R. 65) The same objections and protests set forth then now form the basis for this action filed nearly twenty-two years later.

On September 12, 1925, Ohio responded to said written objections, clearly and unequivocally refusing to make any changes in the charges, setting forth full explanations and reasons for the refusal, and stating in part as follows:

* * *

“Under your fifth contention, you further specify that it was discussed between your clients and representatives of this company, prior to the signing of the agreement, that the Troy Sweet Grass Oil Syndicate should only be charged with the actual expense incurred within the four corners of the lease.

“We contend that all charges that have been made are in fact for the actual benefit of this lease and that it is physically impossible to endeavor to draw and establish a mental or imaginary line around the four corners of the lease in order to determine the amount of money that shall be charged for the development and operation thereon. The real fact in the case is that the joint interest owners shall be responsible for 45% and 55% respectively of all charges incurred in the development and operation of said lands. It cannot make any real difference whether certain work is performed off the lands or not, provided said work actually and in fact does benefit said lands. It would be impossible to do and perform each and every act required in the development of oil and gas on this lease, within the four corners thereof. Take the water line for example. One might easily find that he had no water supply within the four corners of the lease and yet it is impossible to operate a lease without water and consequently the operator would be required to haul water from other lands by the use of a tank wagon or other facility or by use of a pipe line from other premises, and, if your contention in this case is correct, The Ohio Oil Company would not be permitted to charge you for any expense incident to the pipe line after it left the boundary line of your lease, although you can easily see that it is imperative that some means be used to convey water from other land to the leased premises. Again, drilling equipment

might need repairing, for example and according to your contention, it would be necessary for The Ohio Oil Company to perform that work upon the lease or else not charge you for it. *The representatives of The Ohio Oil Company who made this contract with your clients do not recall any conversation relative to making charges against the Troy-Sweet Grass Oil Syndicate for the actual amount of expenses incurred on the lease itself or as you say within the four corners thereof.* The quotation that you make is not applicable to the question here involved, for the reason that that is a clause stating that The Ohio Oil Company shall look to the proceeds belonging to the Troy-Sweet Grass Oil Syndicate, in order to reimburse itself for the cost of developing and operating said lands, and that if said proceeds were insufficient to fully reimburse it, that it would be then required to stand the deficiency itself. In other words, this was and is a contract wherein The Ohio Oil Company was obligated to take all the chance incident to the development and operation of the leased lands and should look solely to productions and equipment for reimbursement. We believe that the contract is a fair one and that what the Troy-Sweet Grass Oil Syndicate desired at the time the agreement was made was the development and operation of said land for oil and gas purposes. *They did not discuss with us nor did they express themselves in the light that the only expense chargeable to them would be the expense incurred within the four corners of the lease.* We contend that we have at all times developed and operated this land in an economical and business-like manner, having due regard to all the existing circumstances.” (R. 73-89 incl.; and 98, 99)

Ohio's representatives referred to in the above letter were Mr. F. E. Hurley and Mr. A. M. Sellery, both of whom are dead. Mr. Hurley died 18 years prior to the commencement of this action, and Mr. Sellery died more than 20 years prior to the commencement of this action.

Mr. F. B. Firmin, referred to above and who rejected appellants' contentions in 1925 on behalf of Ohio, died about five years before commencement of this action. Mr. John McFadyen, Division Manager of the Rocky Mountain Division of Ohio, died more than three years prior to commencement of this action. (R. 154)

On May 20 and June 9, 1936, appellants wrote to Ohio objecting to charges made for auto and trucking expenses. On July 1, 1936, Ohio acknowledged those objections and again refused to make any change in the charges. (R. 352)

Again nothing was heard from nor was any action taken by appellants until the Spring of 1946 when appellants' present counsel conferred with representatives of Ohio and asked for an accounting based upon the same allegedly "improper" charges which Ohio had refused to recognize in 1923, 1925 and 1936. Again Ohio refused to make any change in the charges for the same reasons assigned in those prior years and for the additional reasons set forth in Ohio's Answer herein.

Nothing further was heard from nor was any action taken by appellants until this suit was filed on March 18, 1947.

ARGUMENT.

NO TESTIMONY IS ADMISSIBLE IN THIS CASE TO EXPLAIN, VARY OR INTERPRET THE WRITTEN OPERATING AGREEMENT MADE THE SUBJECT OF THIS SUIT.

Despite appellants' obvious desire to change the provisions of a written contract nearly thirty years later, the operating agreement dated June 15, 1922, is clear and explicit and the law does not permit the introduction of parol evidence to explain, vary or interpret its terms. The trial court had no difficulty whatever in understanding the contract in all its particulars, and in his opinion said:

“As to the language of the agreement in controversy there seems to be no difficulty in understanding its meaning, and it should be remembered that the parties entering into this agreement were engaged in the production of oil and gas, and familiar with the terms of contracts and leases relating to such industry, and knew or should have known the meaning of the language contained in the agreement to which they affixed their signatures.” (R. 146)

The language of that part of the operating agreement alleged by appellants to be the basis for this dispute provides, as heretofore set forth in the Statement of the Case, that in the event of commercial production Ohio was to continue the work of developing and operating the premises in a diligent manner consistent with good business management and was to pay *all costs and expenses* of developing and operating the lands for oil and gas purposes and was to charge Troy for Forty-five (45%) per cent of such costs and expenses. (R. 17)

At the trial, appellants offered in evidence the deposition of T. P. Jones, formerly in command of Troy as its

President and Manager. (R. 178-186, incl.) Most of his testimony, had it been admitted, attempted to vary and, in fact, contradict the plain terms of the written operating agreement of June 15, 1922. However, the trial court had no difficulty in reaching the only proper conclusion when, in his opinion, he said:

“The testimony of Mr. Jones seems to relate to a different agreement from the one at issue in this case; as it appears to the Court no such interpretation or understanding as he has suggested could be entertained *without writing a new agreement*; such a modification could only have been made by another agreement in writing or by any executed verbal agreement; * * *.” (R. 147)

And, further, the Court said:

“This Court cannot write a new agreement for the plaintiffs 28 years after it was entered into by the parties, when such agreement was stated *in plain terms* and was made, and read, and signed by intelligent and experienced operators in this particular line of industry.” (R. 148)

Despite the trial court's finding and conclusions as indicated in his opinion, parts of which are quoted above, appellants would persuade this Court that the sentence in Paragraph III of the operating agreement referred to in connection with costs and expenses does not mean what it so plainly says; that instead of meaning “all costs and expenses of developing and operating said lands for oil and gas purposes * * *” it means something else. Specifically, appellants urge the Court to believe that that language means “costs and expenses of developing and operating said lands for oil and gas purposes, so long as the same do *not* include overhead expenses or other costs and expenses not arising directly out of the drilling and equipping of wells contemplated or within the four corners of the lease.”

No doubt the parties *could have* contracted originally so as to arrive at the result appellants now desire. The fact is—they *did not* limit the expenses as now urged by appellants. It is not to be assumed—since it was never alleged or proved—that the parties negotiated at other than arms length. As stated by the Court, each of the parties to this agreement were in the oil business and had been for some time. The terms, generally, of agreements such as this were not in any sense new or novel to any of them. No abstract grammatical or legal principles are needed to convince any reasonable mind that “all costs and expenses of developing and operating said lands for oil and gas purposes, * * *” means just exactly what it says. “*All costs*” does not and never can mean “*less than all costs.*”

The portion of Paragraph III of the operating contract quoted above clearly provides that Troy was to bear forty-five per cent of “*all costs and expenses of developing and operating said lands for oil and gas purposes.*” This could only mean that so long as such costs and expenses were for the purpose stated, they were to be paid by Troy proportionately out of production. No other purpose or limitation can be read into the contract. If the parties had originally intended any limitation other than “all costs and expenses,” they could have so stated by adding applicable phrases or words.

Appellants contend that the provision in the agreement that Ohio would account to Troy for forty-five per cent of oil or gas produced “at the prevailing market price at the wells” indicates that expenses would be confined to placing the wells in condition to deliver the product at the wells only. That provision states the price to be used in accounting for oil produced and marketed, and fixes that price at the wells. It has nothing to do with the charges for “all costs and expenses” of *developing and operating*

the lands. There can be several different market prices for oil and gas. Here, it *could have been* the prevailing market price in the Salt Creek, Wyoming, field, but it *was* not. The clause in question was purely and simply a description of which market price would prevail in the accounting.

In their brief, counsel for appellants cite various sections of the Revised Code of Montana in connection with the interpretation of contracts. These various sections of Montana statutes become applicable, however, *only if* this operating agreement is ambiguous or uncertain—which the trial court emphatically found it was not. Appellants' counsel, however, make no reference whatever to Section 13-704 R.C.M., 1947, which is as follows:

“The language of the contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”

This section alone disposes of this case.

In addition to the section just quoted above, however, the following sections of the Montana Code, and the decisions with reference thereto, also dispose of the case and clearly indicate that parol evidence, such as was offered in the trial court, is plainly inadmissible for any purpose: Section 13-705, R.C.M., 1947:

“When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter.”

Section 13-710, R.C.M., 1947:

“The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”

Section 13-907, R.C.M., 1947 :

“A contract in writing may be altered by a contract in writing, or by an executed oral agreement *and not otherwise.*”

In *Bullard v. Smith*, 28 Mont. 38, 72 P. 761, 763, a suit on a note, the Court said:

“It is a well settled rule of law that the circumstances under which a contract is made, or the intent of the parties existing at that time, are only material when the contract is ambiguous in some of its terms. If it is plain and unambiguous it needs no construction, *and it is the duty of the court to enforce the contract as made by the parties.*”

The above statement of the rule was quoted with approval in a subsequent decision by the Supreme Court of Montana in *Frank et al. v. Butte & Boulder Mining & Lumber Co.*, 48 Mont. 83, 135 P. 904, 906. That case involved a written contract for the repayment by a corporation out of the first earnings of its business, of a loan of \$30,000.00 made by plaintiff's deceased. In its decision, and relying upon the Montana Code provisions then in effect, and almost identical to those cited above and presently effective, the Court said:

“Whatever impulses may control individual action, courts must be governed by law. It is their province to interpret contracts which are open to interpretation, or they may enforce obligations, *but it is beyond their power to make agreements for parties or to alter or amend those which the parties themselves have made.*”

In *Union Central Life Insurance Co. v. Jensen*, 74 Mont. 70, 237 P. 518, the Court, in construing the terms of a mortgage defeasance clause, said:

“Unless contrary to the law or against public policy, the terms of the contract are controlling.”

And further, after reciting statutes virtually the same as those controlling here:

“We are required to give effect to every part of the contract so as to make its terms operative and are not permitted to make a new contract for the parties, nor to read language into it nor eliminate therefrom any of the lawful terms made by the parties themselves, unless the words employed are meaningless or involve an absurdity.”

To the same effect are *Emerson Brantingham I. Co. v. Haugstead*, 65 Mont. 297, 211 P. 305; *Hinerman v. Baldwin, et al.* 67 Mont. 417, 215 P. 1103; *Iisoski v. Anderson*, 112 Mont. 112, 112 P. 2d 1055.

In interpreting a written contract, the intention of the parties must be ascertained from the writing alone, if possible, and resort to extrinsic evidence in aid of interpretation may be had only when the contract appears on its face to be ambiguous or uncertain. *Armington v. Steele*, 27 Mont. 13, 69 P. 115; *Rowe, et al. v. Emerson-Brantingham I. Co.*, 61 Mont. 73, 201 P. 316; *Wheeler v. James*, 70 Mont. 37, 223 P. 900; *Hill Cattle Corp. v. Killorn, et al.*, 79 Mont. 327, 256 P. 497.

In the *Armington* case, *supra*, involving the exclusion of all testimony altering the plain terms of the tenure under a lease, the court, after confirming the rule which permits evidence of an independent oral agreement *not inconsistent* with the stipulations of the written contract, said:

“This principle, however, does not apply to a case in which the oral promise relates directly to the subject of the contract, even though the claim be that the complaining parties signed the instrument in reliance upon such promise.”

The court then held the evidence to have been properly excluded and quoted a previous Montana decision (*Sanford*

v. *Gates Townsend & Co.*, 21 Mont. 277, 53 P. 749) as follows:

“Where there is no fraud or mistake in the preparation of the instrument, and it appears that the parties signing understood its language and purport, it cannot be reformed on the ground that he signed upon the faith of a contemporaneous oral promise which was not kept, nor may such promise be received in evidence to control the written contract.”

There can be no question in this case that the costs and expenses of developing and operating this land for oil and gas purposes were “related directly to the subject of the contract,” within the rule of the above decision. The appellants’ contentions and the proffered testimony of T. P. Jones are clearly inconsistent with the stipulations and essence of the written operating agreement, and consequently the law does not permit evidence of such alleged independent oral agreements or promises—which in fact were never made in the first place.

The above rules have often been stated and applied by the courts in many other cases involving the admissibility of parol evidence to vary a written instrument. Unless the particular case decided has come within one of the exceptions to the above rules or presents a question in which the written instrument involved was clearly ambiguous and confusing, the courts have without exception excluded such proffered testimony.

Arnold v. Fraser, 43 Mont. 540, 117 P. 1064; *Pitcairn v. Phillip Hiss Company*, 125 F. 110; *Crawford v. Pierce*, 56 Mont. 371, 185 P. 315; *Webber v. Killorn*, 66 Mont. 130, 212 P. 852; *New Home Sewing Machine Company v. Sanger, et al.*, 91 Mont. 127, 7 P. 2d 238; *Continental Oil Company v. Bell, et al.*, 94 Mont. 123, 21 P. 2d 65; *Ikovitch v. Silver Bow Motor Car Company*, 117 Mont. 268, 157 P. 2d 785.

In the case of *Bauer v. Monroe, et al.*, 117 Mont 306, 158 P. 2d 485, involving the application of Sec. 13-907 R.C.M. 1947, providing that a contract in writing may only be altered by another contract in writing or by an executed oral agreement, the court said:

“The rule so set forth in the statute is not a rule of evidence *but it is a rule of substantive law.*”

and further:

“The rule rests on the doctrine that when parties have deliberately put their agreements in the form of a written contract they shall not be allowed to show that the agreement was something else. *Even though testimony in violation of Section 7569 be admitted at the trial without objection, such testimony has no legal effect and it cannot be considered by the court, trial or appellate.*”

In their brief, counsel for appellants cite the case of *Brown v. Homestake Exploration Corporation, et al.*, 98 Mont. 305, 39 P. 2d 168, in which a majority of the court permitted the admission of parol evidence to show and explain the meaning of a clause in an oil development operating agreement which required the defendant-operator to drill wells “to such number and extent as the premises will admit of.” The propriety of that decision is not free from doubt—as evidenced by a strong dissenting opinion. The *Brown* case is clearly distinguishable from the case at bar *because of the difference in contract provisions*. The contract in the *Brown* case provided for the drilling of wells “to such number and extent as the premises will admit of,” and is not entirely free from ambiguity. That phrase immediately raises the question “How many wells were required to be drilled on the lands?” As a consequence, the clause was held to be open to oral testimony.

There can be no question under the agreement in suit as

to what expenses are to be charged to Troy. That matter is resolved by the express terms of the agreement itself which provided that Ohio should charge to the parties, in proportion to their respective interests, "all costs and expenses of developing and operating said lands for oil and gas purposes."

Counsel for appellants also rely upon the case of *Van DePutte, et al. v. Texas Pacific Coal & Oil Co.*, 35 F. Supp. 794, decided by this same trial court and arising out of the same operating agreement as that presented for decision in the *Brown* case, *supra*. In the *Van DePutte* case, the controversy arose over the effect of the "expense" clause in the operating agreement there involved. Hon. Charles N. Pray, Trial Judge, does not, however, consider that case to be in point with this suit, and his present opinion, now under appeal, distinguishing the two cases is as follows:

"The phraseology of the Van DePutte agreement was much different from this case; in that case the plaintiffs, lessors, were repeatedly assured over a long period of time by the defendant, lessee, that they would get together and consider the charges, and that all proper adjustments would be made, but the lessee never kept its agreement to make good these assurances, and finally the plaintiffs brought suit, and the parties stipulated that defendant would submit an account of all charges made under the agreement for determination by the Court; this was done and the Court eliminated all charges deemed to be improper under the agreement; the defense of laches and limitation of actions was pleaded by defendant, but was denied by the Court. If any laches existed in that case, the Court held that both sides were equally blameable." (R. 147)

Obviously the *Van DePutte* case is not in parallel with this case, being clearly distinguishable on the facts. As

found by the trial court, the phraseology of the two agreements is "much different."

To summarize these two cases, the language in the operating agreement of the *Van DePutte* case that "expense of drilling * * * shall be defined to mean * * * actual cost and expense of drilling, equipping and placing all wells in a state of production * * *" is a limitation and something considerably less than "all costs and expenses of developing and operating * * *" the lands in the instant case.

Appellants contend that overhead and district charges are not included within the provisions of the operating agreement, which provides that they should be charged with their proportionate share of "all costs and expenses of developing and operating said lands for oil and gas purposes," and that appellee's accounts improperly included such items therein.

Regardless of their contentions, an overhead charge is just as legitimate as any other actual charge that should be made against this lease. *Bonbright, et al. v. Geary, et al.*, 210 F. 44; *Ft. Dearborn Trust and Savings Bank v. Skelly Oil Company*, 146 Okla. 179, 293 P. 557; *U. S. v. Standard Oil Co. of California, et al.*, 21 F. Supp. 645.

In the *U. S. v. Standard Oil Co. of California* case, *supra*, (p. 656), the court in allowing "overhead expenses" said:

"In the case of a corporation operating on a large scale, it is considered legitimate accounting practice to allocate general overhead expenses to particular operations upon a percentage basis. *In our era of highly developed industrial organizations, management is a legitimate part of operations.* See *Lytle, Campbell & Co. v. Somers, Fidler & Todd Co.*, 1923, 276 Pa. 409, 413, 120 A. 409, 27 A.L.R. 41; 46 C.J. 1162. It is so considered in computing costs. See *Ft. Dearborn Trust & Savings Bank v. Skelly Oil Co.*, 1930, 146 Okl. 179, 293 P. 557; *New Domain Oil & Gas Co. v. McKinney*, 1920, 188 Ky. 183, 221, S.W. 245."

The wells on the leases included in the operating agreement were operated by Ohio within a district in which other wells and properties were being operated. Therefore, the case of *Luling Oil and Gas Co. v. Humble Oil and Refining Company* (Supreme Court of Texas), 144 Tex. 445, 191 S.W. 2d 716, 725, clearly sustains appellee's position here with respect to overhead and district expense items appearing in the monthly statements furnished appellants. Referring to district expense, the court in that case said:

“Specifically, Luling asserts that the fixed per well charges provided for in the contract to cover book-keeping, etc., and ‘all other general and division overhead expenses’ by necessary implication exclude the charges denominated ‘district expenses.’ According to the evidence the jointly owned property consisted of 64 wells. It seems that this property was operated by Humble within a district in which many other wells were being operated other than the property jointly owned by the parties. It is in evidence that Humble allocated to the jointly owned property its proportionate part of the district expenses as the number of wells situated on the jointly owned property bore to the number of wells of the entire district. The control of operations being in Humble under the contract, it was obligated to operate the property in good faith. If in the exercise of that right it was deemed necessary to include the property within a district which embraced other oil producing property, Humble had the right to do so, and under the second clause of the contract it had the right to charge all necessary expenses of drilling, etc., as well as expenses of treating, etc., the oil and gas produced on the property to the joint account. Luling has not directed us to any evidence tending to show that any part of the \$196,135.85 was not a necessary expense in operating the jointly owned property. Neither have we been directed to any evidence tending to show that any part of said sum was not properly allocated to the jointly owned property.”

PLAINTIFFS' ACTION IS BARRED BY STATUTES OF LIMITATION AND LACHES.

The Montana statutes of limitation prescribing the periods for commencement of actions, other than for the recovery of real property, are as follows:

An action upon any contract obligation or liability founded upon an instrument in writing must be filed within eight years (Sec. 93-2603, R.C.M., 1947).

An action upon a contract, account or promise not founded on an instrument in writing must be brought within five years (Sec. 93-2604, R.C.M., 1947).

An action to reform a contract or for relief upon the ground of fraud or mistake must be brought within two years after discovery of the facts alleged to constitute the fraud or mistake (Sec. 93-2607, R.C.M., 1947).

The statutes of Montana are clear that a promise sufficient to toll the statutes of limitation must be in writing signed by the party to be charged thereby. Sec. 93-2716, R.C.M., 1947, provides that:

“No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of Sections 93-2401 to 93-2720, unless the same is contained in some writing, signed by the party to be charged thereby. * * *”

No such written promise is to be found in the record and none was ever made by Ohio.

Appellants failed to commence and prosecute this suit within the period provided by the Montana statutes quoted above, and are now barred thereby under the unquestioned facts of this case. Appellants are also barred and estopped by laches and stale demand.

The subject matter of appellants' alleged cause of action is the cost and expense chargeable under the written oper-

ating agreement of June 15, 1922. The record shows that as early as 1923 appellants challenged the agreement in this respect—but did not sue. Again in 1925, *through their counsel*, they challenged the charges made under the operating agreement in this respect—but did not sue. And finally, in 1936 appellants again challenged the costs and expenses under the operating agreement—but did not sue. The record shows conclusively that at each stage of inquiry and attack Ohio flatly refused to heed or conform to appellants' views, but instead the same were at all times rejected. Appellants' cause of action, if any, therefore arose when the first statements were furnished Troy by Ohio in 1922. No objections were ever made by Troy. If, in September, 1925, appellants did not agree that the operating agreement clearly expressed the intention and agreement between Troy and Ohio, their remedy was one to reform the contract for mistake. Such an action is clearly barred by Sec. 93-2607, Subd. 4, *supra*.

Appellants claim that their failure to file suit is explained by certain alleged verbal conversations in 1926 between Mr. T. P. Jones and Mr. John McFadyen, former Division Manager of Ohio, who died approximately three years prior to the commencement of this action. Attempting to escape the effect of the "Dead Man's Statute," (Section 93-701-3, R.C.M., 1947), appellants offered the deposition of T. P. Jones. It is significant that appellants would now have the Court believe that they place so much reliance on Mr. McFadyen's alleged 1926 statement, yet no reference thereto was ever made by appellants or any of them to Ohio from 1926 until after this suit was filed in 1947. How do they explain that? The Jones testimony is wholly inadmissible and is expressly excluded by said Sec. 93-701-3, R.C.M., 1947, which prohibits parties or assignors of parties to an action or proceeding from testifying as to oral communications between the proposed witness and the deceased

agent of a corporation, except when it appears to the court that without the testimony of the witness injustice will be done. See *Wilcox v. Schissler*, 55 Mont. 246, 175 P. 889.

It is not questioned that Mr. McFadyen was an employee and agent of Ohio and that Jones was a trustee and president and general manager of Troy, appellants' predecessor in title.

Appellants in their brief (p. 52) admit that it is discretionary with the court to permit a witness to testify as to oral communications with a deceased representative of a corporation.

The trial court disposed of appellants' contentions with respect to the proffered Jones' testimony as follows:

"* * * nor could the purported verbal statements of the deceased Ohio representative have been effective to toll the statutes of limitations unless they were submitted in writing. Sec. 93-2716 R.C.M. 1947. From all the evidence and rules that appear applicable it does not seem that this testimony is necessary to prevent an injustice being done in this case." Citing authorities. (R. 148)

The court went on to rule specifically upon the Jones' testimony in the following words:

"Having considered the arguments in favor of and in opposition to the admission of the testimony of Mr. Jones, and numerous authorities cited by counsel for the respective parties, the Court is now of the opinion that the objection thereto should be sustained and such will be the order of Court herein. Even if this testimony were admitted it could be of little probative value as affecting the bar of the statute of limitations, since a continuous and unvarying course of conduct on the part of the defendant has been established by convincing proof over a period of about 25 years during which defendant refused to make any such changes in its charges as were requested by plaintiffs or their representatives." (R. 148)

And in finally disposing of all of appellants' contentions with respect to the statutes of limitation and laches, the court made this succinct statement:

"It appears that plaintiffs finally brought suit in 1947, after all but one of the representatives of defendant who had participated in the making of or execution of the agreement, or had any definite knowledge concerning it, had died. In the Court's opinion this is a tardy suit and the laches of plaintiffs and the statutory limitations cited by counsel would bar recovery under plaintiffs' claim. From a perusal of the facts and contentions of counsel the Court is unable to agree that this undertaking constituted a joint adventure and thereby imposed obligations upon defendant as a trustee for plaintiffs." (R. 149)

In support of the trial court's decision, see the following: *Mossback v. Smith Bros. Sheep Co.*, 65 Mont. 42, 210 P. 910; *Averill Machinery Co. v. Taylor, et al.*, 70 Mont. 70, 223 P. 918; *Langston, et al. v. Currie*, 95 Mont. 57, 26 P. 2d 160; *Pincus v. Pincus' Estate*, 95 Mont. 375, 26 P. 2d 986; *Phelps v. Union Central Life Insurance Co.*, 105 Mont. 195, 71 P. 2d 887; *Rowe v. Eggum*, 107 Mont. 378, 87 P. 2d 189; *Marcellus v. Wright*, 65 Mont. 580, 212 P. 299; 3 Jones on Evidence, Sec. 789; 19 Am. Jur. p. 355.

In the Montana courts the general rule is that laches is considered to be a bar independent of the statute of limitations, and under the facts of this case appellants were certainly guilty of laches in asserting their cause of action if any they had. In *Riley v. Blacker*, 51 Mont. 364, 152 P. 758, the court said:

"Laches, considered as a bar independent of the statute of limitations, is a concept of equity; it means negligence in the assertion of a right; it is the practical application of the maxim, 'Equity aids only the vigilant,' and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable."

Appellants contend that the operating agreement created a joint venture between the parties out of which grew a trust relationship between them. That such contention is without merit is clearly demonstrated in the case of *Luling Oil & Gas Co. v. Humble Oil & Refining Co.*, 144 Tex. 445, 191 S. W. 2d 716, which will be discussed in detail in the next section of this brief with respect to the matter of account stated. Appellants, basing their argument on this erroneous premise, hoped to excuse their negligence or lack of vigilance in bringing their suit within the statutory periods of limitation and to excuse their laches. Ohio is not a trustee for appellants, and the fact that appellants are dissatisfied, because the trial court excluded the Jones' testimony and refused to rewrite the contract for them, does not change the relationship of the parties so as to excuse appellants' failure to act promptly if they actually believed they had a meritorious case.

Appellants are in very poor position to complain of the action of the trial court in rejecting the proffered testimony of T. P. Jones. They state in their brief (pages 52 and 53) that the decisions of the Supreme Court of Montana, construing Sec. 93-701 R.C.M. 1947, " * * * have consistently held *it is discretionary with the court* to permit a witness to testify as to oral communications with the deceased person, deceased representative of a corporation." They have not contended or endeavored to show any abuse of discretion whatsoever on the part of the trial court and are apparently unmindful of the rule governing matters of this character as stated in 5 C.J.S. 500, Sec. 1604:

"Rulings of the trial court with respect to the reception or rejection of evidence, as to which it is vested with a sound discretion, will be reviewed only where such discretion has been plainly abused."

The burden of showing an abuse of discretion rests on the appellant. (3 Am. Jur. 525, Sec. 960)

At the bottom of page 63 of appellants' brief, counsel states:

"Under the laws of Montana and other jurisdictions neither the defense of the statute of limitations nor of laches is available to a joint adventurer or a trustee in an action brought by a joint adventurer or beneficiary for an accounting until after termination of the joint venture or the trust or the repudiation of the trust by the trustees."

citing at page 64, four cases in support of the text above quoted.

Even a casual reading of those cases does not in any way support appellants' contention. They make it clear that even if it be assumed Ohio was a trustee in some respects for appellants, that trust, insofar as the same pertains to the matter of costs and expenses charged under the operating agreement herein, was openly, clearly and unequivocally disavowed and repudiated upon every occasion when appellants' contentions were brought to Ohio's attention, and specifically in writing in 1923, 1925 and 1936. For example, in the case of *State v. Rorabeck*, 111 Mont. 320, 108 P. 2d 601, 604, cited by appellants, the court, after reciting the general rule, states:

"The true rule with respect to the statute of limitations and express trusts is more clearly stated as follows: During performance of the express trust there is no cause of action for breach and so the statute of limitations has no bearing on the rights of the cestui; but, if the trustee violates the trust and the cestui knows of such conduct, or could have learned of it by the use of reasonable diligence, the court will apply the statute of limitations which governs equitable causes of action or an analogous statute concerning legal causes of action. To cause the statute to begin running during the life of the trust there must be some act of repudiation of the trust by the trustee, as where he

declines to account to the cestui, takes trust income for his own purposes, or sets himself up as the owner of the trust capital.”

Appellants claim that there was no repudiation of appellants’ contentions prior to 1943 and that the sale at that time to The Texas Company constituted such a repudiation of the claimed trust, and as a consequence the statutes of limitation do not commence to run until that date.

Appellants must have overlooked the 1923, 1925 and 1936 repudiations of their present contentions.

Appellants’ claim that the sale by Ohio constituted a repudiation of the alleged “trust” is ridiculous, because the 1922 agreement contemplates an assignment or sale by either party and is binding upon successors and assigns. For emphasis we might ask appellants if the sale by Troy to appellants in early 1923 constituted a repudiation of the contract? If so, upon what is their suit now based?

OHIO’S MONTHLY STATEMENTS TO APPELLANTS CONSTITUTE AN ACCOUNT STATED.

Appellants have contended at all times that there is no account stated. The trial judge answered appellants’ contention when he found that appellants had accepted Ohio’s monthly statements with remittance slips, which clearly indicated that checks were in full settlement or in full payment of the respective items for the respective months; that Ohio paid to appellants, during the period between commencement of production and January 31, 1943, approximately \$400,000 over and above appellants’ respective shares of all costs and expenses of developing and operating said lands for oil and gas purposes, and that said statements and payments were accepted by appellants during all of said period, well knowing that Ohio had repeatedly refused to make any changes in its charges, such as appel-

lants proposed, and appellants knew or should have known that the payments were made by Ohio in full settlement of the respective items covered in its monthly statements. (R. 149, 153, 154)

The specific conclusion of law declared by the trial court with respect to this proposition is as follows:

“6. The monthly statements of account furnished by Ohio to Troy, Potlatch and Inland and the acceptance and retention of the moneys paid to them respectively by Ohio with knowledge that Ohio repeatedly refused to make any changes in its accounting and made each payment in full settlement of each statement constitutes an account stated between Ohio and Plaintiffs and may not now be challenged by them.” (R. 156)

Five boxes of monthly statements, remittance slips, etc. (plaintiffs' Exhibits A, B, C and D) have been transmitted to this court as a part of the record herein. A careful examination of these exhibits is invited and will show the detail and completeness of each and every account. Each monthly statement, remittance slip or accompanying invoice shows clearly that the payments computed in accordance therewith were made and stated to be either in full settlement of the items therein mentioned or as payment in full.

An account stated is an agreement between the parties based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance, if any, in favor of one or the other. *Thomasma v. Carpenter*, 175 Mich. 428, 141 N. W. 559; *Thomas O'Hanlon Co. v. Jess*, 58 Mont. 415, 193 P. 65; *Brown v. Southern Grocery Co.*, 168 Ark. 547, 271 S. W. 342; 1 Am. Jur. 272, Sec. 16.

The Supreme Court of Montana has recognized the principle of account stated in numerous cases, one of which clearly demonstrates the soundness of Ohio's defense in this case. In the case of *Norum v. Ohio Oil Company, et al.*,

83 Mont. 353, 272 P. 534, plaintiff sought to recover from defendant a portion of the license tax which defendant had retained from plaintiff's oil royalties in the belief that defendant owed such tax. One of the defenses was account stated, based upon the showing that the monthly statements rendered to plaintiff showed such deductions. The trial court awarded judgment to plaintiff, and on appeal the Supreme Court, while finding that plaintiff was not bound by law or by the contract to pay the tax, nevertheless reversed the trial court and sustained this defense, stating:

“He was chargeable with notice of his legal rights under the law and the express terms of the contract. However, the plaintiff regularly received the monthly statements rendered by the defendants, and accepted and received settlements made in accordance therewith without objection during a course of dealing of more than two years, with full knowledge that deductions were regularly made of 2% of the total royalty agreed to be paid in liquidation of his alleged proportion of the tax. It must be held that this constituted an implied account stated by acquiescence, and the plaintiff may not now recover the deductions so made from the royalty to which he was rightfully entitled under the law and the terms of the contract.”

The record here will show that some corrections were made in the accounting with respect to errors in the amounts of entries only. It will also show that the objections going to the nature of the charges presented in 1923, 1925, 1936 and 1946 were totally repudiated and rejected by Ohio, and yet appellants continued throughout the period of production to receive the itemized monthly statements and to retain the moneys paid them by Ohio. Not one of appellants' questions ever remained unanswered. Therefore, if any one monthly statement was not an account stated when rendered, because of objection made to it, it became an account stated when the error in the amount of the entry was

corrected or when such objection was repudiated, refused or denied, and appellants thereafter took no further action with regard thereto except to retain the sums paid therewith.

The last exchange of correspondence between appellants and Ohio regarding objections to the nature of charges was in the year 1936. By letter of July 1, 1936, Ohio rejected the claim of appellants and thereafter monthly statements and payments were made to and received by appellants without objection. From 1936 until 1946 no further complaint or objection of any character was made to Ohio by appellants. In 1946 appellants' contentions were again repudiated and emphatically denied.

Appellants cite some cases to the effect that the retention of money or payment under periodic statements does not constitute an account stated so long as proper objections are made. These cases, however, do not stand for the proposition that the retention by appellants may continue beyond a repudiation or rejection by appellee of the appellants' objections and claims. If X renders a monthly statement accompanied by check to Y and Y objects to the statement or amount of the check but cashes it after X has repudiated and denied Y's objection, the account becomes stated. Any other result would be unfair and inequitable and would subject the defendant to the reopening of an old account years after it had been adjusted and closed. The appellant in the meantime would retain the proceeds received, well knowing that the amount paid was in full settlement and that their contentions had been repudiated. None of the cases cited in appellant's brief is in disagreement with this proposition.

In the *Norum* case, *supra*, the Montana Supreme Court cited the case of *Chappedelaine v. De Chenaux*, 4 Cranch 306, 2 L. Ed. 629, in which Chief Justice Marshall stated:

"No practice could be more dangerous than that

of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony.”

The rule of law which will not permit the opening of accounts after retention of funds by a plaintiff who has not objected is well expressed by the Supreme Court of Kansas in the case of *McKnab-Bess Oil Co. v. Commonwealth Oil & Gas Co.*, 142 Kan. 739, 52 P. 2d 363. This was an action for accounting between oil companies and the court held that the defendant was not a trustee for plaintiff. The court had before it certain monthly statements submitted by defendant to plaintiff. In deciding against the plaintiff, the Kansas court said:

“The accounts rendered in the case at bar are analogous to those made by a bank. The contract between the parties required that a statement of account should be made showing all obligations and charges contracted. Each statement contained items which made up the amounts it is claimed were erroneously charged. The plaintiff was charged with a duty to examine the accounts that were rendered each month and call the attention of the defendant to any errors or mistakes occurring in them. The plaintiff argues that some of the charges that were made were based on a wrong construction that was placed on the contracts with reference to the 6 per cent charge. No reason appears, however, why that wrong construction could not have been discovered as readily when the first statement was made as more than two years after the last one. It will be noted that plaintiff pleaded that at all times it assumed and believed that the monthly statements made by defendant were correct. No reason is pleaded or advanced in the argument as to why plaintiff was entitled to make any such assumption any more than any person who receives an account and pays it. Plaintiff argues that the relationship between the parties was a semifiduciary one, but the fact is as appears from the petition every transaction between

them was evidenced in writing and they dealt with each other at arm's length at all times. Each monthly account was an invitation to the plaintiff to examine it as to its correctness before paying it. When the auditors of plaintiff did examine the accounts the errors were found that are the basis of this action. Had as critical an examination been made when the first accounts were rendered in 1929, plaintiff would not have been confronted with the defense of the statute of limitations. As it is, we hold that the statute started to run when the first alleged erroneous account was rendered and the action is barred by R. S. 60-306, paragraph 3. This conclusion is fortified by *Porter v. Price* (C. C. A.), 80 F. 655, also *Knox v. Pearson*, 64 Kan. 711, 68 P. 613."

In the instant case, Ohio did not at any time indicate to appellants that any of the claims presented in 1923, 1925, 1936 or 1946 would be recognized or granted, but on the contrary repudiated specifically each and all of such claims, and the vouchers which accompanied the payments recited that the payments represented thereby were in full payment or full settlement of the accompanying monthly statement of account. Appellants thereafter accepted the statements and retained the proceeds with full knowledge of appellee's position in the matter.

In the case of *Luling Oil & Gas Co. v. Humble Oil & Refining Co.*, 144 Tex. 445, 191 S. W. 716, the Supreme Court of Texas in its decision of December 29, 1945 (rehearing denied January 30, 1946) disposes of each and all of the contentions made by appellants here with respect to the application of statutes of limitations and stale demands:

"Suit by Luling Oil & Gas Company against Humble Oil & Refining Company for an accounting and to recover money allegedly due plaintiff as a result of operation by defendant of oil and gas leases owned jointly by plaintiff and defendant. * * *

"Luling Oil & Gas Company entered into a contract

with Humble Oil & Refining Company on the 30th day of July, 1928, wherein Luling obligated itself to sell to Humble an undivided one-half interest in and to certain oil and gas leases covering land situated in Caldwell County, Texas. The consideration for the contract was \$100 per acre and the agreement of Humble to drill one well on the premises at its own cost and expense. The contract gave Humble exclusive charge and control of all operations. All expenses of drilling, developing, operating and equipping said property after the completion of said first well, as well as all expenses of treating, handling, and marketing the oil and gas were to be charged to the joint account. Luling was not liable for its one-half of operating expenses, but Luling's part of such expenses was to be borne by and paid out of its one-half interest in production. The contract contains provisions with reference to charges to be made in the operation of the property between the corporations. The Humble, according to the contract, was to keep accurate records of all joint accounts showing the cost and expenses incurred and charges made and all credits made and received. The contract further provides:

“ ‘Within one month after the close of each calendar month Second Party (Humble) shall furnish to First Party (Luling) a statement of investment and expenses incurred and credits and receipts during such calendar month. Any exceptions to the statement as rendered by Second Party must be made by First Party (Luling) within forty-five days after the receipt of same; and if no exception is made within such time, then such statement shall be conclusively considered as correct. If such statement is incorrect First Party shall be credited for any excess payment made and shall be debited by any excess credit allowed. The provisions of this paragraph, however, shall not prevent annual adjustment of physical property to inventory as above provided.’

“The contract further provides:

“ ‘All proceeds received from the sale of oil and gas produced and saved from the said premises and

pertaining to the working interest shall be first credited to joint account; and if any excess remains after the payment of all charges to joint account then accrued, Second Party shall pay the First Party its one-half of the sums remaining.' * * *

"The Humble drilled and brought into production some sixty-odd wells, a number of which were in production at the time of the trial of this lawsuit in 1942. This suit was filed on the 13th day of November, 1940, in the district court of Harris County. Luling Oil & Gas Company sought a recovery of a large sum of money from Humble Oil & Refining Company alleged to be due because of the Humble's failure to properly account for oil produced and to properly charge expenses in the production and sale of oil which was found under leases owned by both corporations.

"* * *

"Luling complains of the ruling of the Court of Civil Appeals to the effect that all amounts sued for which became due more than four years prior to the filing of this suit are barred by the four year statute of limitation. Its contentions are urged through four points of error, viz.:

"1. That the contract under which the rights of the litigants arose creates a joint adventure or mining partnership, therefore Section 3 of Article 5527, Revised Civil Statutes of Texas 1925, is applicable. Hence limitation does not commence to run against a cause of action for a general accounting until cessation of the business of the mining partnership.

* * *

"4. The claims were not barred by the four year statute of limitation for the reason that the exclusive control of operations and bookkeeping assumed under the contract by the Humble constituted it a trustee for the Luling, and there being no repudiation of the trust the bar of the statute cannot be invoked.

"5. Under the evidence the Humble as trustee of an express trust refused to disclose secret profits to Luling until after this suit was filed, hence Humble cannot invoke the four year statute of limitation.

“Humble contends that Section 3 of Article 5527 has no application to the facts of this case, but rather that the cause of action asserted by Luling is founded upon a contract in writing, therefore the four year statute is applicable.

“Whether the relationship of joint adventure or mining partnership existed between Luling and Humble under the contract does not seem to us to be the controlling issue, since the rights of the parties are fixed by the terms of their agreement. Under our view of the case the real and determinative question is, does the four year statute apply as contended by Humble, or does Section 3 of Article 5527 apply as contended by Luling? Article 5527 in part reads:

“‘There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

“‘Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

* * *

“‘Actions by one partner against his copartner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together.’

“The parties to this action stipulated that the contract is now a valid and subsisting agreement under which the oil and gas leases are being operated. They stand on the rights granted to them under it. Neither company seeks to set the contract aside. The contract required Humble within one month after the close of each calendar month to furnish Luling with a statement of investment and expenses incurred and credits and receipts during such calendar month. *Thus a settlement of accounts between the parties within one month after the close of each calendar month was clearly intended by the use of the quoted language. This provision clearly fixed the time of adjusting the*

accounts made necessary in the operation of the jointly owned leases and the time when the Humble was to pay whatever was due Luling, if any there was, over and above the necessary operating charges against the leases. Under this provision it was the duty of Humble within the time specified to furnish Luling with a correct statement of accounts, both credits and debits, necessarily made in the operation of the property. More specifically, the proceeds received from the sale of oil and gas were first to be credited to the joint account, and if any excess remained after the payment of all charges to the joint account than accrued Humble shall pay Luling its one-half of the sums remaining. *Regardless of whether the relationship of joint adventure or mining partnership existed between the parties, the provisions of the contract clearly fix the time of adjusting the accounts and the time when whatever was due Luling was to be paid under it.* Luling has stipulated that the oil and gas leases jointly owned by it and the Humble were at the time of the trial of this cause being operated under the contract. It is seen that no cessation of the dealings in which Humble and Luling are interested together has occurred. It is not contended that Humble and Luling are partners in the common and ordinary sense of the term; neither is it contended that the parties to this suit have engaged in the trade of merchandise between merchant and merchant, etc. Luling does vigorously contend that under the contract the relationship of joint adventure or mining partnership was created, and in such a case Section 3 of Article 5527 is applicable.

“The statute sought to be invoked is by its own terms limited to the class or classes mentioned therein, that is, one partner against his copartner, and then only for settlement of the partnership accounts, mutual and current accounts concerning the trade of merchandise between merchant and merchant, etc. *It was not intended to apply to a case like the present where joint owners of an oil and gas lease operate the same under a contract whereby accounts of the cost of*

operation are kept upon a monthly basis and the revenue received from the operation is to be paid to the joint owners each month. The parties, as shown by the contract, never intended that a cause of action for whatever was due Luling each month would not accrue until cessation of dealings. The contract made between the corporations specifically provides otherwise. Moreover, in this action Luling claims amounts alleged to be due each month from 1929 through 1940. It claims interest on said amounts. It seems inconsistent at least to say that such sums were then due and payable, yet for the purpose of limitation a cause of action for said sums should be considered as having accrued on a cessation of the dealings in which the parties are interested together. Thus, there being no cessation of the operation of the jointly owned leases, the cause of action has not yet accrued.

“Courts should apply this exception to a limitation statute when required to do so by legislative mandate, but will only apply it to the class or classes of persons clearly coming within its terms, and only in causes of actions named in the statute. The parties to this action not being within the class of persons named in Section 3 of Article 5527, certainly the statute has no application to this suit.

“Luling relies upon the authority of *Cockburn v. Irvin*, Tex. Civ. App., 88 S. W. 2d 747, in which case this court refused a writ of error with the notation ‘dismissed for want of jurisdiction.’ The case cannot be considered as authority for the propositions now pressed upon the court. In that case a partnership was alleged and proven. Cockburn urged the two year statute of limitation. The court held that when a joint adventure or mining partnership was proven and there being no termination of the venture by Cockburn, the joint adventure or mining partnership continued until the suit was filed. In other words, Irvin’s cause of action did not accrue until Cockburn had repudiated his agreement to pay Irvin his one-half of the profits. *In the present case, as we have seen, Humble obligated itself to account for and pay*

whatever was due Luling 'within one month after the close of each calendar month.' Under such an agreement the right to sue came into existence immediately upon Humble's breach of its contract.

*"The accrual of a cause of action means the right to institute and maintain a suit, and whenever one person may sue another a cause of action has accrued. Port Arthur Rice Milling Co. v. Beaumont Rice Mills et al., 105 Tex. 514, 143 S. W. 926. Under the contract in suit Luling had the right to examine at any reasonable time all records of the joint account which was to be accurately kept by Humble, including the right to inspect the wells and the production records and reports. It cannot be doubted that upon Humble's failure to allow an inspection of its records or of the wells at any reasonable time Luling had the right to compel Humble to do so. Moreover, upon Humble's failure to pay whatever sum was due under the contract within the time specified, Luling had the right to compel Humble to pay through a suit in court. These elementary principles make it clear, we think, that while Luling has designated its suit as one for a general accounting, it is not such a suit as would come within the purview of Section 3 of Article 5527, but rather comes under one founded upon a contract in writing. In this situation the statute of limitation begins to run at the time when a suit could be commenced upon the claim asserted. Port Arthur Rice Milling Company case, supra. * * **

"The relationship of partners, joint adventure or mining partners being contractual in its nature, whether such a relationship exists generally depends upon the intention of the parties. Where the controversy is between the parties and the parties are corporations, a court would not declare that a partnership existed unless that intention clearly appeared, even though the purposes for which the contract was made were fully within the purposes for which the corporations are chartered. We are of the opinion that the contract in suit negatives the existence of an intention to create a partnership relation between

Humble and Luling. The contract did not authorize either party to create any liability to third parties which would have been binding on the other. A performance under the contract would not necessarily result in the creation of such a liability. The leased premises were to be operated by Humble exclusively. Luling was not obligated for any of the expense. It had no right to participate until the necessary expense was paid and then was to receive its undivided one-half remaining. *Joint owners of an oil and gas lease may, without forming a partnership, contract for the operation of the leases by one of them and for the operator in the event of success pay to the other joint owner one-half of the proceeds of the sale of the oil and gas less the expense of finding it, without creating a joint adventure or a mining partnership. Transcontinental Oil Co. v. Mid-Kansas Oil Co., 5 Cir., 29 F. 2d 323.*

“Luling insists, as above stated, that Humble, in the operation of the oil and gas leases, assumed the relationship of trustee for Luling, and under well settled principles, there being no repudiation of the trust, and the trust not having been terminated, limitation does not commerce to run against the petitioner’s suit for net profits not heretofore accounted for and paid.

“The contract, as we have stated, fixed the rights and obligations of the parties. The Humble was obligated to keep an accurate account of the joint investment, both debits and credits, and of all income from the sale of oil and gas. It was obligated to give Luling a detailed report of the account within one month after the close of each calendar month. According to the evidence the Humble made these reports of Luling each month. A dispute arose over the accuracy of the statements as early as 1933. Under the contract Luling had the right to inspect the books concerning these accounts at any reasonable time. While Humble was required to keep an accurate record of the joint account and furnish Luling with a statement thereof each month, the contract further

provided that Luling should make its exceptions thereto within a specified time. It was contemplated by the parties that any differences arising between them should be adjusted promptly or at least within a reasonable time. No good reason is suggested why the parties should not be permitted to so bind themselves. *The relationship between Humble and Luling under the contract in suit is not one of trustee and cestui que trust as that relationship is generally understood.* The corporations bound themselves as to the operation of their jointly owned oil and gas leases. *A breach of the agreement by either corporation is a simple breach of a written contract and the law governing the rights incident thereto is controlled by the law of contracts.* Many of the claims asserted in this action grow out of an interpretation of the contract between the parties to it. *Luling contends for one interpretation and Humble opposes.* Under the evidence the opposing views arose between them as early as 1933, and same were denied by Humble in the early part of 1934. No reason is perceived why under the contract Luling could not have been advised fully and urged its contention in a suit filed at that time. *Failing to file suit within four years, it was incumbent upon Luling either to allege a fraudulent concealment or facts which in law would take its cause of action out of the bar of the statute.* We have been cited to no case that presents facts exactly like the facts appearing here, but in our opinion the cases are legion which are analogous to and control the law with reference to the facts in this case. *Powers v. Schubert*, Tex. Civ. App., 220 S. W. 120; *Mounger v. Daugherty*, Tex. Civ. App., 138 S. W. 1070; *Stephens v. Leatherwood*, Tex. Civ. App., 295 S. W. 236; *Hardin v. Hardin*, Tex. Civ. App., 1 S. W. 2d 708; *Lewis v. Saylor*, Tex. Civ. App., 37 S. W. 2d 760; *Owen v. King*, 130 Tex. 614, 111 S. W. 2d 695, 114 A. L. R. 859; Tex. Jur., Vol. 28, p. 295, Sec. 201, p. 297, Sec. 202, p. 299, Sec. 204; *Sidbury v. Ware*, 65 Tex. 252; *Texarkana Motor Co. v. Brashears*, Tex. Civ. App. 37 S. W. 2d 773; *Jolly v. Fidelity Union Trust Co.*, 118 Tex. 58, 10 S. W. 2d 539.”

CONCLUSION.

It is anomalous that this suit for equitable accounting is based on inequity; that to entertain the cause the court must disregard equity. It cannot be otherwise, for on June 15, 1922, the "minds" of Troy and Ohio met in perfect agreement, and to permit these appellants, after nearly 25 years, to *contradict* that mutual pledge of obligations so clearly written and so clearly understood is to work an enormous and unjust hardship on this appellee.

Throughout the years appellants could have brought an action at any time if in fact they truly believed they had been wronged. Short of actual discourtesy Ohio could not have made it plainer at each stage of inquiry and demand that it unequivocally refused and rejected all of appellants' contentions. Failing to take any action whatever to test the validity of their claims, the law of reason compels the certain belief that appellants have slept soundly on any claims they may have had.

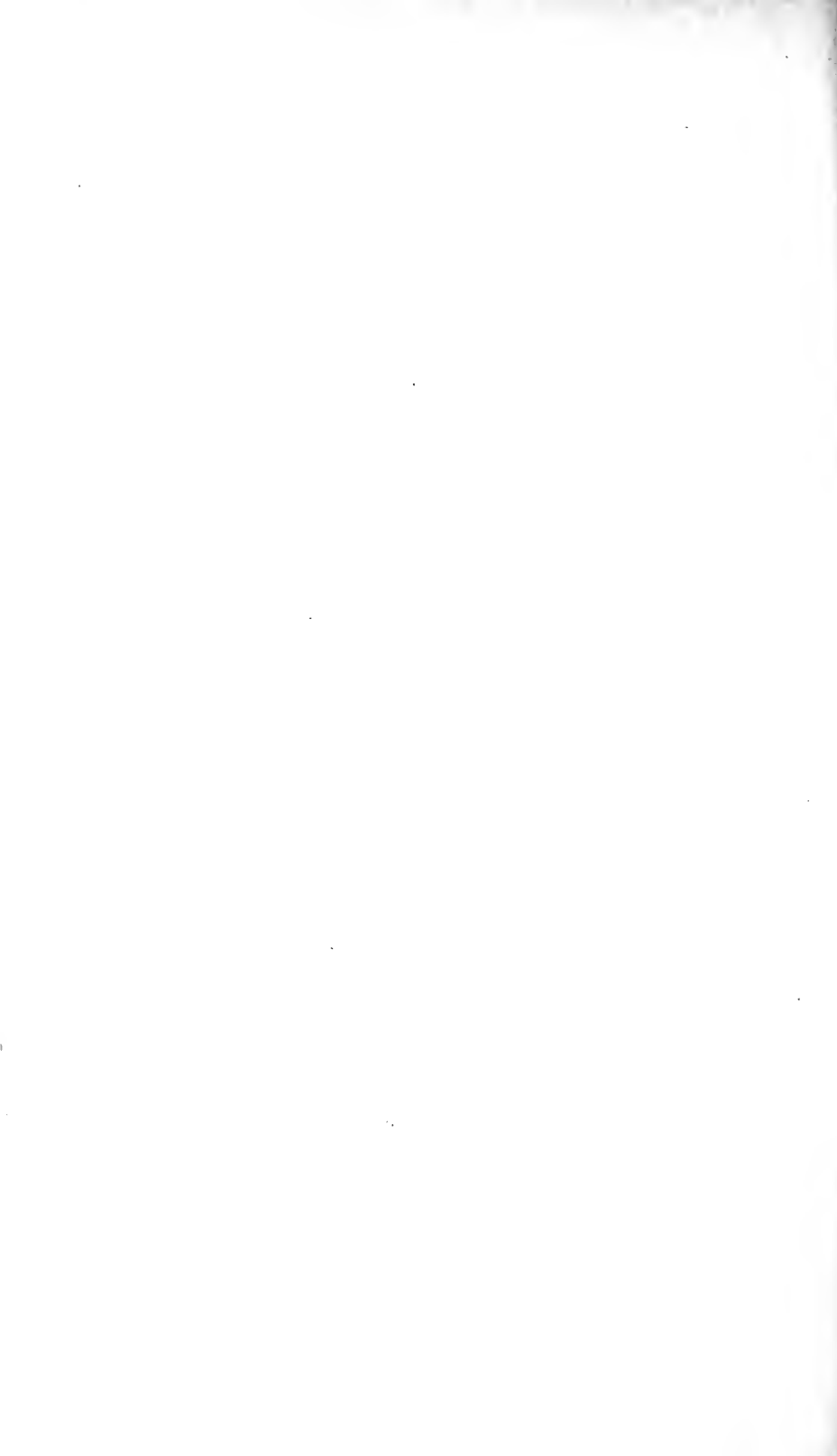
Moreover, appellants' claimed reliance upon the alleged oral statements of Mr. John McFadyen to T. P. Jones in 1926 (in the presence of no one) emphasizes appellants' sham attempt to persuade this court to disregard all equitable principles as well as fundamental and basic rules of pleading and evidence. If in fact any reliance was placed upon such alleged remarks, supposed to have been made shortly after Ohio had twice in writing refused to recognize any of appellants' claims, why is it that appellants remained silent for more than twenty years thereafter, accepted monthly statements and substantial sums of money in full payment and settlement of their respective accounts, all of which were in accordance with Ohio's written interpretations as set forth in 1923, 1925 and 1936?

To summarize, it is clear that the contract here under attack is so perfectly plain in all its terms that to permit a contradiction of any part of it, by parol testimony or otherwise, would be ridiculous and unlawful; that from 1923 these appellants *knew* that appellee refused their claims regarding the nature and extent of the costs and expenses, and appellants' failure to bring suit until 1947 constitutes the most flagrant laches which, together with the running of the statutes of limitation, bars the assertion of appellants' claims; and, that by appellants' acquiescence in the monthly statements rendered by appellee and the retention of remittances tendered by appellee the said statements became accounts stated, or an accord and satisfaction was reached which now estops appellants from reopening or challenging the statements in any way.

Appellee respectfully submits that the findings of fact, conclusions of law and judgment of the trial court in favor of appellee are more than amply supported by the evidence and law and should be in all things affirmed.

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No. 13010

United States
Court of Appeals

for the Ninth Circuit

POTLATCH OIL AND REFINING COMPANY, a
Corporation, and JEAN P. GERLOUGH, STANLEY
H. HODGMAN, and ROY E. LARSON, as Trustees
of that certain trust known as INLAND EMPIRE
OIL AND GAS SYNDICATE, a common law trust,

APPELLANTS,

vs.

THE OHIO OIL COMPANY, a Corporation,

APPELLEE.

APPELLANTS' REPLY BRIEF

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E. J. McCabe, Jr.

Attorneys for Appellants.

Appeal from the United States District Court for
the District of Montana.

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Filed, 1951

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Attorneys for Appellants.

Appeal from the United States District Court for
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In presenting appellants' discussion of matters presented by appellee's brief we shall follow the order adopted by appellee and in referring to the parties we shall adopt the designations observed in appellants' brief first filed herein.

Admissibility of testimony to explain written agreements (Appellees' brief pp. 9-20).

The appellee's assertion that the language of the agreement as to what expenses are chargeable is clear and explicit emphasizes the words "all costs and expenses of developing and operating said lands for oil and gas purposes" but fails to place emphasis on the other equally important and pertinent clause which places a limitation on the words emphasized.

The only language expressing the expenses chargeable against Troy and its successors when properly read together conclusively establishes ambiguity and uncertainty and reads "all costs and expenses of developing and operating the land for oil and gas purposes" and in the same paragraph appear the words "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands." (R. 19, 20). The last clause clearly is a limitation of the extent of Troy's and its successor's liability.

It will be observed that the appellee's brief studiously avoids discussion as to the limitation clause on charges but addresses extended consideration to the

first clause with reference to cost and expenses of development and operation. (Brief 9-12, 17).

Examining the first clause in the light of the rule that "words of a contract as to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given them by usage, in which case the latter must be followed (Sec. 13-710, R.C.M. 1947) and it not appearing the parties used the language in a technical sense or that a special meaning is given to the words by usage then the question is what meaning would ordinary people attribute to such language? Can it be reasonably said that the ordinary person would understand same to mean expenses other than such as is directly connected with the developments and operations conducted on the land and would such ordinary person understand it to mean all indirect expenses however and wherever occurred which may be remotely traced to the operations on the land such as overhead expenses incurred away from the lands, traveling expenses of officers of the operating company incurred at other places, and other incidental expenses incurred away from the scene of the actual operation and development. We think not. We submit that the ordinary person would understand the language to mean reasonable expenses and costs incurred directly on the land being developed and operated. However the parties did not leave the term all costs and expenses alone for interpretation

but limited same by expressly providing Troy and its successors should not in any case be held or charged beyond its interest in the production and equipment.

Appellee cites Luling Oil and Gas Co. v. Humble Oil and Refining Company 144 Tex. 445, 191 S. W. 2d. 716, at 725 as holding overhead and district expenses are legitimate expenses, chargeable to appellants. Analysis of the cited case will disclose that its decision is not pertinent to the question here involved. The language of the agreement in the cited case is much broader than the language in the present agreement. In the cited case the agreement with reference to charges to be made against the joint accounts provided (191 S.W. 2d. at pp. 724) as follows:

“No home office or overhead charge shall be made to the joint account in connection with the operation of said premises; but to cover bookkeeping, accounting and office expenses generally a charge on each well, while actually drilling, of \$50.00 per month and a charge of \$25.00 per month on each producing well shall be made to the joint account, and to cover supervision and all other general and division overhead expenses a charge of \$25.00 per well on each producing well and \$50.00 per month on each drilling well shall also be made to the joint account.”

“All expenses of drilling, developing, operating and equipping said property after the completion of the first well, as well as expenses of drilling, handling and marketing the oil and gas produced therefrom shall be charged to the joint account.”

Further there was no clause in the Luling contract

reading “but in no case” was Luling to be “finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands.” It is significant, however, that Luling and Humble, operating oil companies, recognized in the agreement the distinction between “office or overhead charge” to cover bookkeeping accounting and office expense generally; “supervision and all other division and overhead expenses” and “All expenses of drilling, developing, operating and equipping said property after the completion of the first well, as well as expenses of drilling, handling and marketing the oil and gas.” (191 S.W. 2d at pages 724,725). Ohio however, would have this Court believe there is no distinction and all such expenses are expenses of development and operating lands for oil and gas” and that costs incident to marketing the oil and gas are also included in expense of developing and operating the land for oil and gas notwithstanding the obvious distinction and proper classification respectively of such expenses.

Appellee’s witness, A. M. Gee, by deposition in referring to the clause limiting charges in answer to interrogatory No. 21 of his deposition (R. 561, 562, 587) said:

“No, sir. By that clause it was definitely understood and agreed between those parties that it meant that The Ohio Oil Company, as the operator and the one required to advance all the funds necessary to develop and operate the jointly owned leases, would have to look solely to the oil and gas

produced, saved and marketed from the leases themselves for reimbursement for all expenditures made by it, and that under no circumstances would the Troy-Sweetgrass ever have to pay Ohio anything if the proceeds derived from the production of oil and gas from the jointly owned leases were insufficient. That is all that this clause meant. It was so explained to Mr. Jones and neither Mr. Hurley nor myself told him that under that provision there would be nothing charged to Troy-Sweetgrass Oil Syndicate after the wells were put into operation, or anything to that effect."

Thus, Ohio itself found it necessary to introduce testimony of its witness A. M. Gee as to what was said and intended by the parties when the agreement was being prepared to support its interpretation of this clause thereby demonstrating that Ohio impliedly concedes the clause renders the agreement on the question of chargeable expenses uncertain as to its meaning.

Defendant's contention that paragraph III authorizes direct and indirect charges irrespective of where incurred reduces the interpretation to absurdity as it would justify a portion of charges for office buildings and equipment at Casper, Wyoming, its division headquarters, part of payroll of office employees, traveling expenses of personnel, and could justify refinery costs and expenses and other expenses to no end as being part of necessary indirect expenses connected with the performance of the written agreement. The Montana statutes cited by Ohio in its brief at pages 12, 13 sustain appellants

contention in that the present agreement is not self interpreting and resort to extrinsic evidence is necessary as defendant has demonstrated by its reliance on the oral testimony of A. M. Gee, quoted and discussed above.

The Montana decisions cited by Ohio (brief pp. 13-17 incl.) excepting *Brown v. Homestake Exploration Corporation*, all related to written contracts which were self interpreting. With the view of saving the court unnecessary extended reading of the cases cited, we submit brief analyses of the cited cases.

Frank et al v. Butte and Boulder Mining & Lumber Co., 48 Mont. 83, 135 Pac. 904, was to recover money which by written agreement and was to be repaid out of net earnings of a corporation. The Court held the mode of payment being expressly provided and there being no net earnings, the action would not lie.

Bullard v. Smith, 28 Mont. 387, 72 Pac. 761, was an action on a promissory note. Oral testimony tending to vary its terms was rejected.

Union etc. Insurance Co. v. Jensen, 74 Mont. 70, 237 Pac. 518, was ejectment action to recover property under a clause in a mortgage expressly giving mortgager right of possession upon default by mortgagee. Ejectment adjudged.

Emerson Brantingham etc. Co. v. Raugstead 65 Mont. 297, 211 Pac. 305, was action to recover against guarantor of payment for property sold a third party. The Court considered evidence of what was said and

done by the parties as explaining the intent.

Hinerman v. Baldwin, 67 Mont. 417, 211 Pac. 1103, was an action to cancel an oil and gas lease for mistake because the lessor did not know what the word "royalty" meant. Court denied relief on the ground that the word "royalty" meant a share of the product or profit from the operation of lands for oil and gas.

Lisoski v. Anderson, 112 Mont. 112, 112 Pac. (2) 1055 is an action to recover damages. The plaintiff had given a full and complete written release and satisfaction to a joint tortfeasor of defendant which expressly released such joint tortfeasor and "all other persons, firms, and corporations from all claims, demands, action or causes of action" arising out of the accident whether "known and unknown, suspected and unsuspected." The court denied plaintiff, *Lisoski*, relief on the ground that when he released one tortfeasor without reserving action against the other tortfeasor expressly in the written release, all tortfeasors were released.

Armington v. Stelle, 27 Mont. 13, 69 Pac. 115, was brought to recover possession of a mining claim. The claim was leased by written lease specifying the term of possession. The Court granted the relief sought and denied the defendant permission to show an oral agreement that the lessor promised to give him an extension of the lease upon its termination.

In *Rowe v. Emerson-Brantingham I. Co.*, 61 Mont. 73, 201 Pac. 316, the Court held that where written agreement warranted a threshing machine "will"

do the work as good as any other machine manufactured for like purpose the oral testimony of the purchaser as to an oral statement the machine would clean and thresh alfalfa seed as good as any other machine was inadmissible as varying the terms of the written agreement.

Wheeler v. James, 70 Mont. 37, 223 Pac. 900, holds that where a building contract was clear as to the obligations and liabilities of the parties oral testimony of a custom that such a contract was not binding upon the parties until approved by the architect was inadmissible.

Hill Cattle Corp. v. Killorn, 79 Mont. 327, 256 Pac. 497, in an action for accounting involving the construction of an employment (ranching) contract the Court allowed certain limited expenses to be chargeable against defendant as expressly restricted by the contract notwithstanding the general provision appearing for all charges of "operating expenses." In brief, the Court recognized that a general all embracing clause for expenses chargeable was to be limited by a subsequent special restrictive expense clause.

Sanford v. Gates Townsend Co., 21 Mont. 277, 53 Pac. 749, was an action to recover personal property involving a written agreement. The defense was fraudulent representations inducing the making of the agreement. The Court held that the oral representations did not induce the defendant's sign-

ing of the written agreement. (Judge Pemberton dissented).

In *Arnold v. Fraser*, 43 Mont. 540, 117 Pac. 1064, an action to cancel a written agreement for sale of land payable as expressly provided for in the writing, the Court held evidence of an oral agreement made at the time that plaintiff would permit defendant to sell parts of the property at not less than \$100.00 an acre and apply the proceeds on purchase price was inadmissible as varying the written agreement.

The cited case of *Pitcairn v. Phillip Hiss Company*, 125 Fed. 110, involved writings for the repair and decoration of a house at specified prices. Oral testimony of defendant husband was offered on behalf of defendant wife that it was orally agreed that as a condition of payment the work must be done to the satisfaction of the wife. The testimony was rejected as varying the express terms of the written agreement.

The case of *Crawford v. Pierse*, 56 Mont. 371, 185 Pac. 315, involved a written agreement supplement to a prior agreement for sale of lands, which supplemental agreement expressly recited it was being made for the purpose of granting the buyer additional time in which to make payments. The Court held that such language precluded the idea that there was any other purpose.

Webber v. Killorn, 66 Mont. 130, 212 Pac. 852, involved a written contract for the sale of lands and

buildings mentioned in the writing but were also covered by an oral agreement for the sale of the same buildings on certain terms which oral agreement had been fully performed. The Court held that evidence of the executed oral agreement was admissible in the action involving the written agreement for the sale of the lands under the rule that a written agreement may be modified by an executed oral agreement.

New Home Sewing Machine Co. v. Songer et al, 91 Mont. 127, 7 Pac. (2) 238, cited at bottom of page 24 of Ohio's brief, supports plaintiffs' contentions. Action was to recover on writings embracing sale of sewing machines. The plaintiff introduced at the trial a written order for twenty sewing machines which contained the printed provisions as follows:

"Terms—net 60 days 2% Cash Discount in 30 days from date of invoice, F.O.B. shipping point. If further time is desired we (or I) agree to give note or notes with accompanying order or upon receipt of invoice. \$.....Due....., with interest at 6% per annum, 60 days from date of shipment, 'following which is written "Finance Plan."'

The order also contained this printed provision:

" 'It is understood that no conditions agreed to by any salesman or agent and not embodied herein will be in any way binding on the New Home Sewing Machine Company, and it is understood and agreed that the New Home Sewing Machine Company shall not be in any way liable under any separate or collateral agreement made between the undersigned and its salesmen.' "

Plaintiff also introduced a writing signed by one Johnson as a salesman for plaintiff reading "We are

prepared to finance your deferred payment lease contracts through the purchase from you of contracts as are acceptable.” The evidence offered by defendants and received over objection by the trial Court related to an oral agreement made between the defendants and plaintiff’s salesman, Johnson, his conduct in selling machines at retail, giving instructions in the art of dressmaking, collecting down payments, taking old machines in exchange which he hold, retaining the proceeds, and certain correspondence between plaintiff and defendant. Plaintiff on appeal contended the words “finance plan” interpreted themselves and left no room for construction nor introduction of evidence explanatory of the circumstances under which the agreement was made. The Court said (91 Mont. pp. 132, 133):

“While it is true that the term “finance plan” is in general use, we are not prepared to say that it has any well-defined or fixed meaning. It is a matter of common knowledge that the finance plans employed in the business world in the distribution and disposal of merchandise are varied, and that the use of the term by one concern would mean one thing, and when used by another would denote something entirely different.

“The meaning of the term used is not so free from doubt that it can be said as a matter of law that it furnishes its own interpretation. That the writing does not contain all the conditions of the agreement is apparent; resort must be had to extrinsic facts for an explanation of plaintiff’s finance plan. The agreement is uncertain and ambiguous, and the court ruled correctly in admitting the evidence.”

Applying the reasoning of the cited case to the present writing, the words "all costs and expenses of development and operating said lands for oil and gas purposes" followed by the later clause in the same paragraph that "in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands," presents an ambiguous agreement, and the testimony of Jones is admissible.

In *Continental Oil Company vs. Bell, etc.*, 94 Mont. 123, 21 Pac. (2) 65, the action was to recover balance due under a written contract for sale of gasoline to a dealer which expressly fixed the sales price. The Court held that testimony of the defendant of an oral contract to refund a portion of the price was inadmissible as varying the express terms of the written contract of sale.

Ikovitch v. Silver Bow Motor Car Co. 117 Mont. 268, 157 Pac. (2) 785, involved an alleged conversion of an automobile by the vender's repossession under the written agreement by reason of purchaser's (plaintiff) default. The written contract expressly provided that all repairs to the automobile were to be made at the buyer's expense. The trial Court permitted the plaintiff to testify to an oral agreement to the effect that if the buyer made the repairs, the defendant seller would give buyer credit for the cost of the same. The majority opinion (J. J. Adair and Angstman dissenting) held the oral evidence was inadmissible to contradict the express writing

covering repairs and that the oral agreement was not an executed one and was not admissible.

In *Bauer v. Munroe*, 117 Mont. 306, 158 Pac. (2) 485, the question involved was whether evidence of an oral agreement was admissible to modify or cancel a written agreement for sale of land containing all of the terms of the sale. Held the oral agreement was still executed and could not modify the written agreement.

A reasonable construction to be placed upon the words "development" and "operation" in the light of the Jones testimony is that costs and expenses chargeable to Troy is the expense of developing i.e., that is drilling and discovery of oil and gas and the expense of maintaining those wells in a state of production.

Guanacevi v. Com. Int. Revenue,
(C. C. A. 9th) 127 Fed. (2) 49, 51.

Carnegie Nat. Gas Co. v. South Penn Oil Co.,
(W. Va. C. A.) 49 S. E. 548.

Creech v. David,
140 So. 265 (C. A. La.)

STATUTES OF LIMITATION AND LACHES (pp. 23-26)

The appellee does not deny the principles of the cases cited in appellants' original brief on pages 55 to 76 but relies on *Riley v. Blacker*, 51 Mont. 364, 152 Pac. 758, (brief p. 23) and *Luling Oil & Gas Co. v. Humble Oil & Refining Co.* 144 Texas 445, 191 S. W. 2d 716 (pp. 24, 31-40) of brief. *Riley v. Blacker* is neither by analogy of fact or principle applicable.

In *Riley v. Blacker* there was no fiduciary relation between the parties, as here, no explanation for the delay was given, as here and the enforcement of the right under the facts in the cited case would have been inequitable. No inequitable result would follow enforcement of plaintiffs' rights in the present instance.

Ohio cites *Wilcox v. Schissler*, 55 Mont. 246, 175 P. 889, as excluding the testimony of Jones as to promises by McFadyen, agent and general manager of Ohio, that corrections would be made on a final accounting (brief p. 21, 22).

This case absolutely sustains the admissibility of Jones' testimony. The action was to foreclose a mortgage wherein the defendant claimed that the mortgage was obtained by fraud of plaintiff's deceased agent. Over objection the defendant was permitted to testify as to transactions with the deceased agent. The appellate Court approved the ruling of the trial court and held the exclusion of the statute may not by construction be extended to exclude persons not clearly falling within its express terms since the statute is an exception to section 7890 R.C.M. (section 10534 R.C.M., 1935, now sec. 93-701-2 R.C.M. 1947) which provides who are competent as witnesses. The Court held that the purpose of the legislature in enacting the statute was to declare a party dealing with an agent incompetent to testify as to any transaction or conversation with the agent in a suit against the principal **"the effect of which would be to render**

the principal liable by reason of the particular act or declaration of his agents.” (emphasis supplied).

In this case Jones’ testimony as to McFayden’s promises of correction of all erroneous charges upon a final accounting to be rendered by Ohio is not offered or relied upon to render Ohio liable for an accounting, as such,, but is offered as one of the circumstances which with the fiduciary relation between Troy and its successors and Ohio and the other circumstances of the case as explaining the delay in filing suit. The liability of Ohio to account exists by virtue of the existing operating agreement which is signed.

Appellee cites a part of section 93-2716 R.C.M. on page 20 of brief as barring the promise of Manager McFadyen to Jones.

Mr. McFayden was the general manager in charge of all business of Ohio in the Rocky Mountain area. His acts and promises are the acts and promises of Ohio. Defendant does not deny he had authority to make the promise to Jones. His death was not laches of plaintiff (see authorities cited and consideration of this point, pages 66 to 71 appellants’ brief heretofore filed).

Appellants make no claim of reliance upon the McFayden or Yealy promises as evidence of a new or continuing contract. Reliance is placed on the then and presently existing contract. Ohio’s argument apparently is that plaintiffs should not have believed the representations of its managers that

it would correct any wrongs and errors and would perform its agreement. All we are asking is that it do perform its agreement.

The defendant overlooks the last sentence of the statute quoted which reads **“But this section does not alter the effect of any payment of principal or interest which payment is equivalent to a new promise in writing duly signed to pay the residue of the debt.”** (Emphasis supplied). The statements (Exs. A, B, C, D, and E) received in evidence without objection disclosed a continuing indebtedness on the current account with payments made by Ohio thereon monthly, the last payment being made in February following its sale of its interest in January, 1943, to the Texas Co. The very statute cited defeats the defense of statute of limitations urged.

Luling Oil & Gas Co. v. Humble Oil and Refining Co. 144 Texas 445, 191 S.W. 2d 716 is quoted from at length by appellee on statute of limitations and accounts stated. See same case 192 S.W. 2d 315. An examination of this case discloses that the court held the contract involved did not constitute the parties joint adventurers or trustee and cestuis que trust. We submit that the controlling decisions, those from the Supreme Court of Montana cited and discussed at pages 58 and 69 of appellants first brief, establish that Montana would consider the parties as joint adventurers and under the express provisions of the Montana statutes cite dat page 63 of appellants' first brief, determine their relation also as a trusteeship. In the

same Texas case the agreement expressly provided that if exceptions to the monthly account were not made within forty-five days from the rendition "then such statement shall be conclusively considered as correct," and that the statute then commenced to run. However, the same case held and adjudged that as to incorrect charges in statements against which the statutory period had not run, recovery would be and was allowed to plaintiff. Hence under the rule of that case the learned Judge of the trial court in this action was in error when he adjudged appellants' action was barred by statute of limitations, presumably the eight year statute for commencement of actions based on a written agreement and dismissed the action.

The complaint in this action was filed below on March 18, 1947, and computing back eight years would render the action not barred as to erroneous charges made by Ohio after March 18, 1939, since Ohio continued to operate under the agreements until January 31, 1943, when it sold out to the Texas Company.

Furthermore in the Luling case no promise to rectify was made the other cases city by appellee on pages 27 to 31 do not support its contentions.

In McNab-Bell Oil Co. v. Commonwealth Oil & Gas Co., (Kans.) 52 Pac. (2) 363, two oil companies were jointly operating a lease, and pursuant to contract, monthly statements of account of expenses incurred by one company were rendered to its associate, the

debit balances of which were paid without objection every month until the termination of the contract. No objections of any kind to the monthly statements were made at any time. Upon completion of the contract the parties entered into a written settlement contract wherein one company acknowledged and paid its indebtedness to the other and thereunder one party assigned and transferred to the other party all of the leases involved, and each of the parties discharged and released the other party in writing from any claims growing out of the joint ownership and operation of the leases with certain excepted claims not pertinent to the present inquiry. Approximately three years thereafter one of the parties brought an action based upon certain alleged erroneous charges under the original agreement. The Court held that the retention of the monthly statements without any objection thereto by the plaintiff constituted an account stated. The Court (52 Pac. (2) page 36) refers to the fact that the alleged errors or mistakes were never called to the attention of the party rendering the statement, and again on page 36 the Court citing authorities held that the subsequent contract of settlement by the parties and the mutual release in writing constituted a settlement of their mutual business affairs and under the circumstances in view of want of objection made, the rule of account stated was applied. In the instant case the very facts lacking in the cited case, to-wit, objections to the correctness of account, are present; and in the present

case no written mutual accord or settlement agreement and mutual release of the parties was ever entered into.

Thomasma v. Carpenter, 175 Mich. 428, 141 N.W. 559, holds contrary to defendant's contention. The Michigan Court held that the doctrine of "account stated" does not apply to a special contract. The decision follows the rule of the California decision, *Moore v. Bartholome Corporation* (Calif. App.) 159 Pac. (2) 436, and Wisconsin case of *Keith, Admr. v. Rust Land & Lumber Company*, 167 N.W. 432 and of the late Oregon case of *Halverson v. Blue Mountain Prune Growers Co-op.* 214 Pac. (2) 986.

In *O'Hanlon v. Jess*, 58 Mont. 415, 193 Pac. 65, the itemized statement was never at anytime objected to.

Brown vs. Southern Grocery Co. 168 Ark. 547, 271 S.W. 342, held that the rendition of the statement setting forth items of debt and credit did not constitute an account stated, as such account must be balance rendered with the assent to it; that it was not shown that the account was intended as a final adjustment and settlement between the parties nor that there was an agreement express or implied that it should be so regarded.

Defendant quotes at length from *Norum v. Ohio Oil Co.*, 83 Mont. 353, 272 Pac. 534. In the first place, no fiduciary relations existed between the parties in the *Norum* case, each party not sharing in the expenses and profits as in the present case. The cited

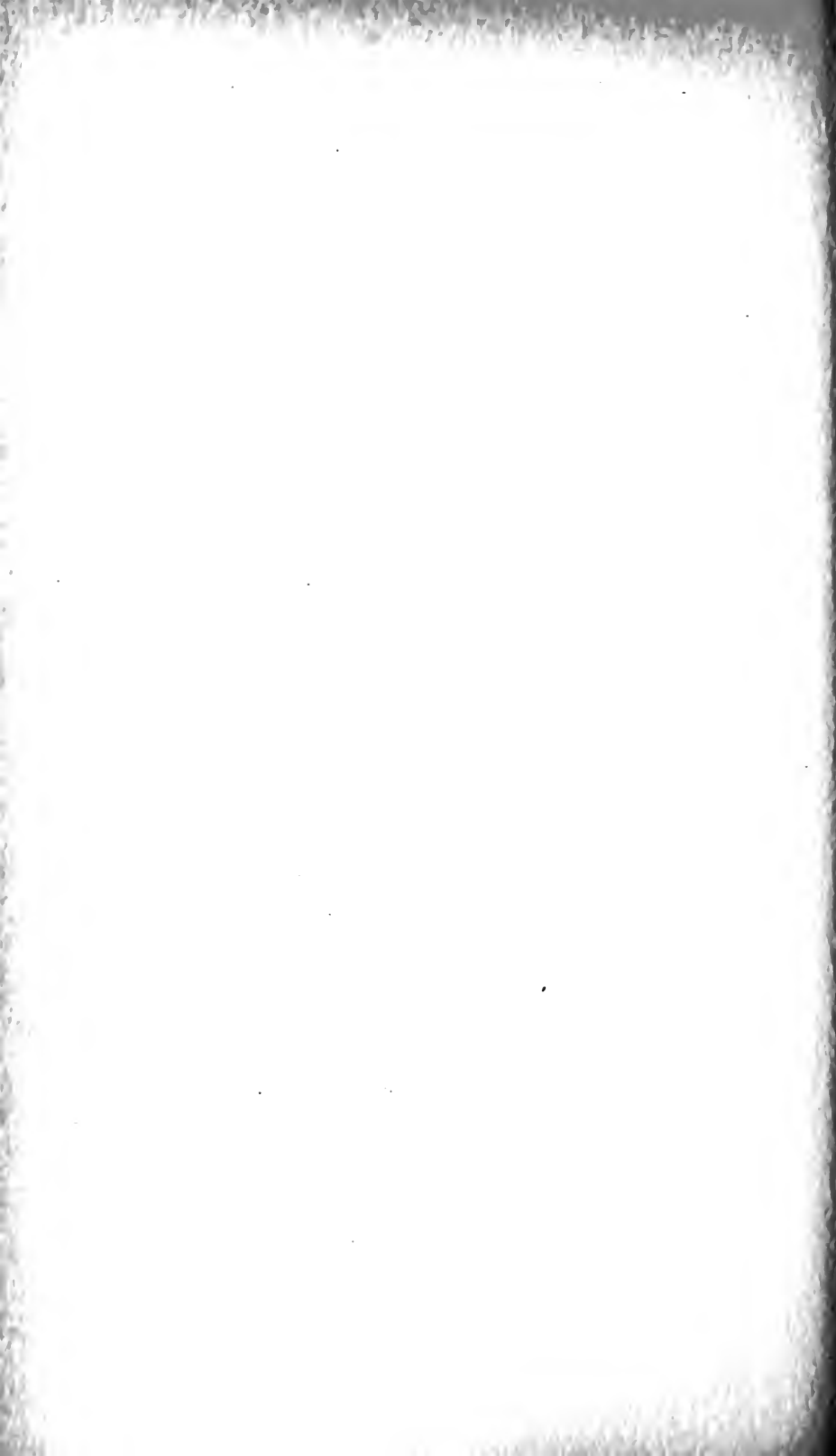
case involved royalty payable under the ordinary oil and gas lease. The decision is impertinent to the present situation; in fact, the decision rested upon the fact that the erroneous items of taxes paid were never objected to by the plaintiff, Norum. In the present case, objections to erroneous charges were repeatedly made.

The judgment below should be reversed and an accounting ordered.

E. J. McCabe

E. J. McCabe Jr.

Attorneys for Appellants



No. 13010

IN THE
United States
Court of Appeals
for the Ninth Circuit

POTLATCH OIL AND REFINING COMPANY, a
Corporation, and JEAN P. GERLOUGH,
STANLEY H. HODGMAN and ROY E. LARSON,
as Trustees of That Certain Trust
Known as Inland Empire Oil and Gas
Syndicate, a Common Law Trust,

Appellants,

vs.

THE OHIO OIL COMPANY, a Corporation,

Appellee.

Upon Appeal From the District Court of the
United States for the District of Montana

PETITION FOR REHEARING

E. J. McCABE,
E. J. McCABE, Jr.
Great Falls, Montana
Attorneys for Appellants

Filed 1952

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THE OHIO OIL COMPANY, a Corporation,
Appellee.

Upon Appeal From the District Court of the
United States for the District of Montana

PETITION FOR REHEARING

To: The Honorable United States Court of Appeals
for the Ninth Circuit:

Come now the appellants in the above entitled
cause, by and through the undersigned, their at-
torneys, and respectfully petition the Court to vacate
its decision and judgment in the above entitled case
dated and filed October 30, 1952, and to grant ap-

pellants a rehearing in said cause upon the following grounds and for the following reasons:

I

This Court, in holding that the statute of limitations barred any relief to the appellants, erroneously concluded that the statute of limitations commenced to operate in 1923, 1925 and 1936 respectively, to forever defeat the right of appellants to obtain an accounting for all the improper charges made by appellee under the operating agreement (Court's opinion pp. 5, 6) on the theory that refusal of the appellee to correct the charges objected to by appellants constituted a complete repudiation of the trust, assuming the appellee was a trustee. In brief that the statute of limitations has a prospective operation that defeats a recovery for all improper charges and breaches of trust of a similar character by the trustee in the future as well as the past, and thereby effects a modification of a written agreement notwithstanding the trustee continues to act and was bound by the terms of such agreement.

The statute of limitations does not constitute a performance of the obligations of the trustee but merely prevents recovery for past breaches occurred, assuming for argumnet only that the statute commenced to run when the appellee refused the claims of appellants in 1923, 1925 and 1936.

The applicable Montana rule is that the statute is not a performance of the obligation but merely a bar to the remedy if asserted.

Berkin v Healy,
52 Mont. 398, 158 P. 1020

Hicks v. Stillwater County
84M. 38, 274 Pac. 296

Betor v. Chevalier
121 Mont. 337, 193 Pac. (2) 374.

The court apparently and inadvertently overlooked the fact the appellee still continued to be a trustee of moneys improperly retained from appellants from March 18, 1939 to and including January 30, 1943, and which were not barred by the statute, since the appellee during that period continued to act under and receive the benefits of the contract and the complaint was filed March 18, 1947, within the eight-year statutory period.

II

The Court (opinion pages 13, 14) erroneously concluded that the action was barred by laches under the assumption that the action was barred by the statute of limitations and thereby inadvertently overlooked that for the years from March 18, 1939 to January 31, 1943, the statute had not run against the appellants for such years and consequently the rights of appellants were not barred by either limitations or laches for conduct by appellee during such years.

III

The Court inadvertently and erroneously concluded that the meaning of the provision of the operating agreement that Ohio **“will pay all expenses and costs**

of developing and operating said lands for oil and gas purposes as herein provided, and shall charge the said party of the first part Forty-five (45%) percent thereof” (emphasis supplied) was the primary question raised by the complaint. (Opinion pp. 12), the Court apparently overlooking the following provisions in the same operating agreement,” **The party of the second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expense of developing and operating said lands and leases**” (Tr. p. 20) and **“but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands”** (emphasis supplied). The opinion wholly fails to mention the last two provisions thereby failing to observe the statutory rule in Montana,

“The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable each clause helping to interpret the other.”

Sec. 13-707 R.C.M. 1947.

As a result the court failed to interpret the contract made but in effect interpreted a different one.

IV

The Court (opinion pp. 7-12) held that the witness Jones was incompetent to testify concerning the statement of McFadyen the general manager and agent of The Ohio Oil Company, in charge of the operating of said Company on the ground the death

of McFadyen disqualified Jones under section 93-701-3 R.C.M. 1947.

Apparently the Court wholly overlooked the purpose of such testimony of Jones and the rule of *Wilcox v. Schissler*, 55 Mont. 246, 175 Pac. 889. The purpose of Jones testimony was to show a circumstance reflecting upon whether the delay of the appellants commencing suit was excusable. It in no way established the contract or any obligation under the contract between appellants and Ohio Oil Company. This matter was discussed at length at pages 71 to 76 of appellants original brief and the evidence was, we believe, clearly admissible for that purpose. The case of *Schissler vs. Wilcox* above noted, construed the "dead man" statute and held it applied "only who seek to charge a principal by means of transactions or declarations of one known to be an agent of the principal."

The cases cited in support of the Court's decision at page 11 of the opinion were all cases wherein a contract was sought to be established by evidence of declarations of a deceased person.

Phelps v. Central etc. Insurance Co.,
105 Mont. 195, 203, 71 P. 2d 887,

Langston v. Currie
95 Mont. 57, 71, 26 P. 2d 160,

Cox v. Williamson
124 Mont. 512, 520, 227 P. 2d 614.

In the present case the contract was both admitted by the pleadings and established by independent

evidence and the rule of the above cases do not apply.

V

We respectfully invite attention to that part of the opinion (pp. 5, 6) wherein the Court in effect concluded the appellees refusal to pay the appellants their claims in 1923, 1924 and 1936 constituted a repudiation of the trust. The present action seeking accounting was also for monies improperly held during the eight year statutory prior to March 18, 1947, date of filing the complaint (Tr. pp. 11 to 16, 25). Appellees duty as a joint adventurer, trustee and fiduciary to truly account and pay over monies improperly withheld remained notwithstanding appellants be deemed by the Court to have been barred by laches and limitations as to money withheld prior to the last mentioned statutory period. As long as the Appellee continued to act under the operating agreement it was a joint adventurer, trustee and fiduciary, and the obligation to pay appellants the money due them for the period that was not barred by the statute.

VI

The rule of practical construction by acquiescence of the parties relied upon as establishing the meaning of the written contract to be as found by the lower court is wholly without application. The rule of acquiescence applies where by reason of silence for a long period one is presumed to have consented to the act.

30 C. J. S. par. 117 page 539,

Blacks Law dictionary, deluxe edition p. 32. "Acquiescence."

Repeated express objections, written and oral, to the appellee's acts under the agreement and its purported interpretation rebuts conclusively any inference of acquiescence or consent to such conduct.

VII

The Court in concluding that the testimony of appellants witness Jones inadmissible apparently overlooked the fact that the appellee had waived any objection under the "dead man" statute by taking and introducing in evidence on appellee's behalf the deposition of A. M. Gee who testified concerning the transactions between Jones and deceased parties to the transaction and what information was given as to the terms of the agreement by the parties including Sellery and Hurley, now deceased (Tr. 553-560) and for the further reason the appellee pleaded correspondence relative to the transaction between the representatives of appellants and Mr. Firmin, deceased (Tr. 53, 65-89) and for the further reason the appellee stipulated for admission of written communications between the appellants Wilson and appellee's Hurley (deceased) (Tr. 306-317), and by also pleading in the answer communications between appellants' representative Freeman and appellee's Firmin deceased, relative to the transaction (Tr. 65-89).

In *Ellis vs. Wadleigh*, 182 p. 2d 49, pars. 4, 5, page 55 the Court held that both by failing to make proper

~~—8~~ *the objection was waived*
objection and by cross-examination of the witness,
Jones Deposition (Tr. pp. 469-475, 478-491, 491-494)
discloses examination at length relative to the trans-
action by the appellee thereby waiving the objection
under the “dead man” statute.

Re Gerlach 72A 2d 271, 16 A.~~4~~.R. 2d 1397.

As appears from the case of Wright vs. Wilson,
154 F. 2d 616, 620, cited at page 9 of the Court’s
opinion the rule excluding testimony, of the character
of Jones, is condemned “by all of the modern writers
on the law of evidence” and Courts favorably incline
to facts upon which they may predicate waiver of
the statutory rule, such as cross examination, or
testimony received on behalf of the protected party
and other acts.

58 Am. Jur. pars 356-361, pp. 209-214.

As is stated substantially, in the excerpts in the
footnotes to Wright vs. Wilson, 154F. 2d, 620 the rule
has outlived its usefulness and the reason for its
existence no longer exists.

When the reason for the rule ceases to exist so
should the rule.

49 R.C.M. 1947.

Respectfully submitted.

E. J. McCABE,

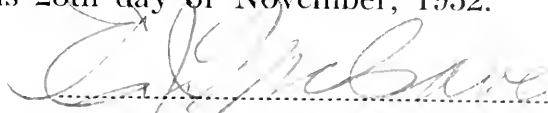
E. J. McCABE, Jr.

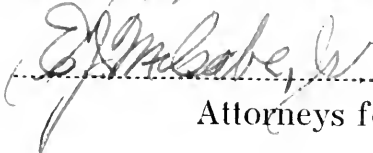
Attorneys for Appellants

CERTIFICATE

We, E. J. McCabe and E. J. McCabe, Jr., attorneys duly and regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit do hereby certify that in our judgment the foregoing Petition for Rehearing in case No. 13010, wherein Potlatch Oil and Refining Company, a corporation, and others, are appellants and The Ohio Oil Company, a corporation, is appellee is well founded and that it is not interposed for delay.

Dated this 28th day of November, 1952.





Attorneys for Appellants.

AFFIDAVIT OF SERVICE

STATE OF MONTANA }
County of Cascade } ss.

E. J. McCabe, being duly sworn, deposes and says:

That he is one of the attorneys of record for the appellants named in the foregoing Petition for rehearing and resides and maintains his office at Great Falls, Montana,

That Mr. Louis P. Donovan, residing at Shelby, Montana, and Mr. W. H. Everett, residing at Casper, Wyoming, are attorneys for the appellee named in said petition.

That on the ~~28th~~ day of November, 1952, affiant enclosed true copies of the foregoing Petition for Rehearing in two separate securely sealed envelopes addressed respectively to Mr. Louis P. Donovan at Shelby, Montana, and to Mr. W. H. Everett, at Casper, Wyoming, and deposited said envelopes in the United States Post Office at Great Falls, Montana, with postage thereon fully prepaid.


.....

Subscribed and sworn to before me this ~~28th~~ day of November, 1952.


.....

Notary Public for the State of
Montana. Residing at Great Falls,
Montana. My commission expires

(Seal)

.....

No. 13012

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

UNITED STATES OF AMERICA and ELEUTERIA BROWN
ARENAS, also known as DELLA NICHOLSON,

Appellees.

OPENING BRIEF FOR APPELLANT, LEE ARENAS.

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No. 13012
IN THE
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LEE ARENAS,

Appellant,

vs.

UNITED STATES OF AMERICA and ELEUTERIA BROWN
ARENAS, also known as DELLA NICHOLSON,

Appellees.

**OPENING BRIEF FOR APPELLANT,
LEE ARENAS.**

Opinion Below.

The opinion of the District Court is reported in 95 Fed. Supp. 962, and is also set out in the Transcript of Record at pages 20-53.

Jurisdiction.

This is an appeal by plaintiff, Lee Arenas, from the final judgment of the District Court entered March 8, 1951. Notice of appeal was filed April 3, 1951.

The jurisdiction of the District Court was invoked under the Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345, and under the Act of March 3, 1911, as amended, 28 U. S. C. A., Section 1353, and under the Act of March 4, 1931, as amended, 28 U. S. C. A., Section 2410.

The jurisdiction of this Court is invoked under Section 1291 of Title 28, U. S. C. A., and under the Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345, providing that in cases under that Act the right of appeal shall be allowed to the parties as in other cases.

Statutes Involved.

Involved herein is the construction of the Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345; the Act of June 25, 1910, as amended, 36 Stat. 855, 25 U. S. C. A., Sections 372 and 372a, and the Act of June 25, 1948, Ch. 646, 62 Stat. 934, 28 U. S. C. A., Section 1353.

Statement.

This action was brought by plaintiff Lee Arenas against the United States of America and Eleuteria Brown Arenas, also known as Della Nicholson, to obtain the following relief, to wit:

(1) That the trust patent issued by the United States of America to Eleuteria Brown Arenas for an undivided one-half interest in the lands allotted to Guadalupe Arenas, the deceased wife of Lee Arenas, which lands were awarded to Lee Arenas by the judgment of the District Court on May 14, 1945, be declared null and void and that said patent be canceled;

(2) That plaintiff's equitable right and title to said lands be quieted against the United States of America and Eleuteria Brown Arenas, and each of them; and that the defendants, their agents, attorneys, and representatives be enjoined from interfering with the plaintiff's possession, use and enjoyment of said lands; and

(3) For general relief.

Plaintiff Lee Arenas is a person of Indian blood and descent, and is an enrolled member of the Agua Caliente Band of the Mission Indians of California, and has resided on the Reservation of said Band in Riverside County, California, at or near Palm Springs all of his life. Guadalupe Arenas, his deceased wife, was also a member of said Band of Indians. She died intestate in 1937.

By the Act of March 3, 1917, Congress directed the Secretary of the Interior to cause allotments of land in severalty to be made to all of the Mission Indians of California. A Special Allotting Agent was appointed for that purpose in 1922. In 1923 said Special Allotting Agent completed and certified to a schedule of allotments to each and every member of the Agua Caliente Band of Mission Indians. This 1923 Schedule was disapproved in January, 1927, by the Secretary of the Interior, because the allotting agent had made selections for the members of the Band who had failed or refused to make voluntary selections for themselves. The Secretary directed the allotting agent to prepare another allotment schedule and to include therein only such Indians as should make selections of land for allotment for themselves and their minor children.

In May, 1927, the allotting agent completed and certified to another, and second, schedule which contained only the names of the members of the Band who had actually made selections for themselves and their minor children in accordance with the General Allotment Act of 1887 and instructions of the Secretary. This schedule contained, among others, the names and selections of Lee Arenas and his wife Guadalupe, and also the name of Eleuteria Brown Arenas, also known as Della Nicholson, who had been taken into the home of Lee and Guadalupe and remained with them for ten or more years. The United

States contends that Lee and Guadalupe Arenas adopted Eleuteria according to tribal custom, which is denied by Lee Arenas and others—of which more later.

The schedule of 1927 was neither approved nor disapproved by the Secretary of the Interior for nearly twenty years after it was certified and transmitted to the Department by the Allotting Agent. (For a complete statement of the facts, see this Court's opinion, by Judge Garrecht, in *United States v. Arenas*, 158 F. 2d 730.)

In 1940 Lee Arenas filed an action in the District Court for the Southern District of California, Central Division, being No. 1321-O'C Civil, and entitled *Lee Arenas v. United States of America*, wherein he claimed to be entitled to the lands selected by him and Guadalupe for allotment in 1927. He also claimed to be entitled to the lands selected in 1923 for his father and brother. Action No. 1321-O'C Civil was tried and a judgment was entered awarding the lands selected by Lee and Guadalupe and for his father and brother to him, the said Lee Arenas. The complaint in said action alleged, among other things:

"That thereafter, on the 26th day of March, 1927 (1937, as later found), the said Guadalupe Arenas died, leaving plaintiff as her sole heir at law and next of kin * * *."

A similar allegation was made as to Francisco and Simon Arenas, father and brother, respectively, of Lee Arenas.

The judgment and decree in said case adjudged and decreed:

"That plaintiff, Lee Arenas, is now the sole surviving heir at law and next of kin of each of the three above named decedents (*i. e.*, Guadalupe, Francisco, and Simon Arenas) and as such heir at law is en-

titled, under the laws of descent and distribution of California, to succeed to the estate of each of said decedents * * *.

“That the plaintiff, Lee Arenas, is entitled to a trust patent for each and every of the above described allotments provided for in Section 5 of the said Act of January 12, 1891 (26 Stat. L. 712-714—the Mission Indian Act), the patents and each of them to be effective as of June 21, 1923, this being the date upon which the period of restriction on alienation prescribed therein shall begin to run.” [Tr. of Rec. pp. 41, 95. Case No. 11195 in this Court.]

The United States of America appealed to this Court from said judgment. In the lengthy opinion of the Court, prepared by Judge Garrecht, the judgment below was affirmed in all respects, save one, as to the allotments of Lee Arenas and Guadalupe Arenas. The exception was that the trust period as to said allotments should begin to run on and from May 9, 1927. The judgment was reversed as to the allotments to Francisco and Simon Arenas because they died before the 1927 allotment proceedings.

This Court said in its opinion in said case:

“We therefore hold that the appellee (Lee Arenas) has inherited Guadalupe’s equitable rights under her certificate of selection for allotment and the inclusion of her name in the 1927 schedule.”

The decree of this Court adjudged, in this connection:

“* * * that portion of the judgment of the said District Court in this cause, which holds that the appellee is entitled to a trust patent for his allotment and for that of his wife Guadalupe, to be effective as of June 21, 1923, is modified so as to make the effective date May 9, 1927, and, as so modified,

that portion of the judgment be, and hereby is affirmed * * *.”

It thus appears that this Court affirmed the judgment of the District Court in all respects, save the one exception set forth therein, as to the allotments of Lee and Guadalupe Arenas. (Certiorari was denied by the Supreme Court, 331 U. S. 842.)

After certiorari was denied by the Supreme Court a copy of the judgment, as affirmed, properly certified, was duly transmitted to the Secretary of the Interior, as provided by 25 U. S. C. A., Section 345.

Notwithstanding the judicial determination that Lee Arenas was the sole heir at law and next of kin of his deceased wife, Guadalupe Arenas, and as such entitled to the lands selected by her for allotment in 1927, the United States of America, acting through its Examiner of Inheritance, on or about July 25, 1949, issued an order purporting to declare and adjudge that the heirs at law and next of kin of Guadalupe Arenas were, and are, Lee Arenas and Eleuteria Brown Arenas, and that said persons are entitled to share equally in the allotted lands of Guadalupe Arenas. [See Deft. Ex. “A,” being a transcript of the proceedings before said Examiner of Inheritance.]

On or about November 8, 1949, the United States issued a purported trust patent to Eleuteria Brown Arenas declaring that she is the owner of an undivided one-half interest in the lands of Guadalupe Arenas.

The present suit followed, for the purposes already stated.

The judgment of the trial court in this case is based exclusively upon the proposition that the order of the Examiner of Inheritance [Deft. Ex. "A"] is *res judicata* as to the heirs of Guadalupe Arenas. Said order reads, in part, as follows:

"Now, Therefore, by virtue of the power and authority vested in the Secretary of the Interior by section 1 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to Departmental Regulations of May 29, 1947, delegating probate authority to the Examiners on Inheritance, I hereby find, adjudge, and declare that at the date of the above-mentioned hearing the heirs of said decedent, *determined in accordance with the laws of the State of California*, and their respective shares in decedent's estate were: Della Brown Nicholson (Eleuteria Brown Arenas) daughter (*adopted by decedent in accordance with established Indian Tribal Custom*), $\frac{1}{2}$, Lee Arenas, husband, $\frac{1}{2}$." (Italics ours.)

It will be noted that the order states that the determination of heirship was made by the Examiner (1) "in accordance with the laws of the State of California" and (2) that Eleuteria is Guadalupe's daughter "adopted by decedent in accordance with established Indian Tribal Custom." The two quoted statements not only contradict each other, but are factually false. The determination was *not* made in accordance with the laws of California, nor was Eleuteria adopted by Guadalupe in accordance with established Tribal Custom. Transcript of the proceedings held by the Examiner may be treated as a judgment roll, and it does not warrant either of said statements, *supra*.

Questions Involved.

The questions involved on this appeal are almost fully stated in appellant's Statement of Points on Appeal, and may be repeated here for convenience:

1. The Court erred in finding, concluding and adjudicating that the District Court, and on appeal the United States Court of Appeals for the Ninth Circuit, in Case No. 1321-O'C Civil, entitled "Lee Arenas, Plaintiff, vs. United States of America, Defendant," did not have jurisdiction to determine the right of Lee Arenas to a trust patent to the lands selected by his deceased wife, Guadalupe Arenas, for allotment in severalty.

2. The Court erred in finding, concluding and adjudicating that the judgment of the District Court in Case No. 1321-O'C Civil, entitled "Lee Arenas, Plaintiff, vs. United States of America, Defendant," as affirmed by the United States Court of Appeals for the Ninth Circuit (certiorari denied by the Supreme Court, 331 U. S. 842, 67 S. Ct. 1531), is a nullity and void *ab initio* in so far as said judgment adjudicates the right of the said Lee Arenas to a trust patent covering the lands selected for allotment in severalty by Guadalupe Arenas, the deceased wife of Lee Arenas.

3. The Court erred in finding, concluding and adjudicating that the said judgment entered in said Action No. 1321-O'C, as affirmed, may be collaterally attacked and impeached in another action after said judgment had been affirmed and had become final.

4. The Court erred in finding, concluding and adjudicating that Eleuteria Brown Arenas, also known as Della Nicholson, was adopted by Guadalupe Arenas in accordance with established Indian Tribal Custom.

5. The Court erred in finding, concluding and adjudicating that the evidence introduced and received in the so-

called heirship proceedings conducted by and before J. Lee Rawhauser, Examiner of Inheritance, on or about June 8, 1949, is sufficient to show that Eleuteria Brown Arenas, also known as Della Nicholson, was adopted by Guadalupe Arenas in accordance with established Indian Tribal Custom, or otherwise.

6. The Court erred in finding, concluding and adjudicating that the decision of J. Lee Rawhauser, Examiner of Inheritance, in said heirship proceeding is final and *res judicata* as to Lee Arenas, or binding upon him in view of the final judgment, as affirmed, in said Action No. 1321-O'C Civil, certiorari denied, 331 U. S. 842.

7. The Court erred in adjudging that Eleuteria Brown Arenas, also known as Della Nicholson, is entitled to a trust patent to one-half of the lands allotted in severalty to Lee Arenas as the sole heir at law of his deceased wife, Guadalupe Arenas, by the former judgment of the District Court.

8. The Court erred in granting an injunction restraining plaintiff Lee Arenas from using and enjoying the lands allotted to him as heir at law of Guadalupe Arenas by the former judgment of the District Court in Action No. 1321-O'C Civil.

9. The judgment of the Court is not supported by the evidence.

10. The decision of the Examiner of Inheritance that Guadalupe Arenas adopted Eleuteria Brown Arenas, also known as Della Nicholson, is not supported by any competent material evidence.

11. The Court erred in finding, concluding and adjudicating that said determination of heirship was made by the Examiner of Inheritance in accordance with the laws of the State of California.

ARGUMENT.

I.

The District Court Had Jurisdiction to Determine the Right of Lee Arenas to the Lands Allotted to His Wife Guadaloupe Arenas, and to Decide Every Question Relating to Such Right.

It is too well settled to require citation of authority that the District Court has jurisdiction and power to determine the right of any person of Indian blood or descent to an allotment of land in severalty.

25 U. S. C. A., Sec. 345;

28 U. S. C. A., Sec. 1353.

It should again be noted that the question of the District Court's jurisdiction to decide the right of Lee Arenas to his deceased wife's lands, which she had selected for allotment, was squarely presented by the complaint in Action No. 1321-O'C Civil in said court. At no stage of the proceedings had in that case did the United States challenge, or even remotely question, the jurisdiction of the District Court to determine that Lee Arenas, *as the sole heir at law and next of kin of his deceased wife*, was entitled to the lands selected by her for allotment in severalty and a trust patent thereto. On appeal to this Court, no question was raised as to the District Court's jurisdiction, and this Court expressly affirmed the judgment adjudging that Lee Arenas was the sole heir at law and next of kin of Guadaloupe and as such entitled to a trust patent to her lands. And, again, no question of jurisdiction was raised by the United States in its petition for certiorari filed in the Supreme Court of the United States.

It has long been settled law that where a court, and especially a court of equity, has jurisdiction of the parties and subject matter of an action, it has the right and power to decide every question which necessarily occurs in the cause; and whether its decision be correct or otherwise its judgment, unless reversed, is regarded as binding upon the parties in every other court.

Peck v. Jenness, 48 U. S. 612, 12 L. Ed. 841;

Hollingsworth v. Barbour, 29 U. S. 466, 7 L. Ed. 922;

Barnett v. Mayes, 43 F. 2d 521, 527;

Hoffman v. McClelland, 264 U. S. 552, 558;

Hartford Acc. & Indem. Co. v. So. Pac. Co., 273 U. S. 207;

Minneman v. Fed. Land Bank, 105 F. 2d 263;

35 C. J. S. 790, Sec. 11 of Federal Courts, and cases cited.

The principle stated, *supra*, is especially applicable in suits in equity, such as are contemplated under 25 U. S. C. A., Section 345, and 28 U. S. C. A., Section 1353.

The rule is of ancient origin. It seems to have been first applied by the Supreme Court in *Diggs v. Walcott*, 4 Cranch. 119. Later (in 1849) in *Peck v. Jenness*, 48 U. S. 612, 12 L. Ed. 841, the Court explicitly stated the rule as follows:

“It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the

right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court."

Almost one hundred years later, in *Hartford Accident & Indemnity Co. v. Southern Pac. Co.*, 273 U. S. 207, the Court said, at pages 217-218:

"Where a court of equity has obtained jurisdiction over some portion of a controversy, it may, and will in general, proceed to decide the whole issues and award complete relief, even where the rights of parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law. Pomeroy's Equity Jurisprudence (4th Ed.), Sections 181 and 231; *United States v. Union Pacific Railway Company*, 160 U. S. 1, 52, 16 S. Ct. 190, 40 L. Ed. 319. See, also, equity rule 10, amended May 4, 1925, 268 U. S. 709, appendix."

In *Minneman v. Federal Land Bank*, 105 F. 2d 363 (1939), the Court quoted approvingly the following language from *Hollingworth v. Barbour*, 4 Peters 466, 471, 7 L. Ed. 922 (1830):

"The principle is too well settled, and too plain to be controverted, that a judgment or decree pronounced by competent tribunal, against a party having actual or constructive notice of the pendency of the suit, is to be regarded by every other co-ordinate tribunal; and that if the judgment or decree be erroneous, the error can be corrected only by a superior appellate tribunal. The leading distinction is between judgments and decrees merely void, and such as are voidable only; the former are binding nowhere; the latter everywhere, until reversed by a superior authority."

A composite statement of the rule, drawn from most, if not all, of the federal decisions on the subject, is found in 35 C. J. S. 790, Section 11 of the title "Federal Courts," as follows:

"Where a federal court has properly acquired jurisdiction, it has the right, power, and authority to decide and determine the entire controversy and all the issues and questions involved in the case; and, at least in equity, it may retain and exercise jurisdiction for the purpose of doing complete justice between the parties and awarding relief as full and complete as the circumstances of the case and the nature of the proof may require. Jurisdiction, once acquired, will not be ousted by a subsequent change in the condition of the parties; it lasts until the court finishes with all parts of the controversy; and it is not exhausted by the rendition of a judgment, but continues until the judgment is satisfied."

The federal decisions clearly hold that a judgment not appealed from, or not set aside on appeal, is effective as an estoppel upon the points decided, whether the decision be right or wrong.

Reed v. Allen, 286 U. S. 191, 52 S. Ct. 532;

Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 47 S. Ct. 600;

North Carolina R. Co. v. Story, 268 U. S. 288, 45 S. Ct. 531;

Mo. Pac. R. Co. v. Ault, 256 U. S. 554, 41 S. Ct. 593;

North Carolina R. Co. v. Lee, 260 U. S. 16, 43 S. Ct. 2.

In *Reed v. Allen*, 286 U. S. 191, 52 S. Ct. 532, *supra*, the Court reviewed numerous cases on the point, and then said (286 U. S. 201):

“These decisions constitute applications of the general and well-settled rule that a judgment not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong. *Cornett v. Williams*, 20 Wall. 226, 249, 250, 22 L. Ed. 254; *Wilson v. Deen*, 121 U. S. 525, 534, 7 S. Ct. 1004, 30 L. Ed. 980; *Chicago, R. I. & P. R. Co. v. Schendel*, 270 U. S. 611, 617, 46 S. Ct. 420, 70 L. Ed. 757, 53 A. L. R. 1265. The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.”

The other cases above cited are to like effect.

Where the United States is a party to a suit involving Indian lands, or where it is not a formal party but has counsel of its choice to actively aid in the conduct of the litigation, it is concluded by the judgment rendered therein.

Drummond v. United States, 324 U. S. 316, 65 S. Ct. 659, 660;

United States v. Candelaria, 271 U. S. 432, 46 S. Ct. 561, 564;

Souffront v. Compagnie, 217 U. S. 475, 30 S. Ct. 608;

Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. Ed. 129, and other federal cases.

One of the principal issues in action No. 1321-O'C Civil (No. 11195 in this Court) was whether Lee Arenas

was entitled as sole heir at law of Guadaloupe Arenas to her allotment of lands in severalty. The United States offered no objection to the jurisdiction of the District Court, nor any defense based upon want of jurisdiction, to decide that issue. Indeed, in its opening brief in said case in this Court the United States expressly said, under the heading "Jurisdiction," pages 1-2, *id.*:

"The jurisdiction of the district court was invoked under the Act of August 15, 1894, as amended, 28 Stat. 286, 305, 25 U. S. C. A., Sec. 345, which authorizes Indians who are claiming allotments to prosecute suits therefor in the proper district court of the United States and gives such courts jurisdiction of such suits * * * providing that, in such cases under that Act, the right of appeal shall be allowed to the parties as in other cases."

Under the overwhelming weight of authority, the United States is bound by the final judgment and decree in that suit, and said judgment and decree is *res judicata* on the question of the right of Lee Arenas to the lands selected by Guadaloupe for allotment.

The point under discussion is thus stated in 50 C. J. S., pages 102-103:

"A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. In other words, he must present his whole case, extending his claim so as to embrace everything which properly constituted a part of his cause of action or defense * * *."

To the same effect, See *Grubb v. Public Utilities Comm.*, 281 U. S. 470; *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, and numerous cases cited in note 16 of the text of 50 C. J. S. 102-103, *supra*. Also, 30 Am. Jur. 912; Restatement, Judgments, Sec. 63; Freeman on Judgments (5th Ed), pages 1417, 1432.

The authorities cited, *supra*, should be considered in connection with the fact that at all times during the litigation in Case No. 1321-O'C Civil the United States was the trustee of Eleuteria Brown Arenas, and as such representing her interests. In a large, and we believe controlling, sense she, the said Eleuteria Brown Arenas, by virtue of privity, is likewise bound through her trustee.

II.

The Judgment in Lee Arenas v. United States, No. 1321 O'C Civil in the District Court, Cannot Be Collaterally Attacked, as Here, for Want of Jurisdiction.

The District Court based its judgment on its asserted lack of jurisdiction in Case No. 1321 O'C Civil to determine whether Lee Arenas was entitled as sole heir at law to the lands allotted to Guadeloupe Arenas. The judgment followed the contention of the United States that said Court could not determine that matter because of lack of jurisdiction, despite the fact that the District Court, this Court, and by denial of certiorari the United States Supreme Court, had decided that the District Court had jurisdiction in said case, to decide each and

every issue presented therein. Undoubtedly, the District Court had jurisdiction of the subject matter (the claim of Lee Arenas to allotments) and the parties.

It must be noted that whether Lee Arenas was the sole heir at law of Guadeloupe Arenas was a question incidental to the establishment of his claim to her allotment, hence necessary to the decision of the case. A court of equity has jurisdiction and power to decide any issue or question necessary to grant equitable relief.

35 C. J. S. 790, and cases cited.

The rule of law invoked by the appellees is not without exception, as is shown by numerous decisions of the federal courts.

Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 S. Ct. 217;

Dowell v. Applegate, 152 U. S. 327, 14 S. Ct. 611;

Nye v. United States (4 Cir.), 137 F. 2d 73, 77;

Windhals v. Everett (4 Cir.), 74 F. 2d 834;

Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134.

In *Des Moines Nav. Co. v. Iowa Homestead Co.* (1887), 123 U. S. 552, 8 S. Ct. 217, *supra*, plaintiff corporation sued another corporation, a resident of the same state, and also sued non-resident defendants who removed the cause to the United States Court. All defendants answered without objection to the court's jurisdiction, the case was tried and judgment was entered without objection to the jurisdiction. The case was appealed to the Supreme Court of the United States and there decided

without objection being made to jurisdiction. In a later case, in the Iowa state court, between some of the parties to the former suit, the judgment in the former case was pleaded as *res judicata*. To this plea, the other party asserted that the former judgment was of no binding force and effect and void for want of jurisdiction of all courts rendering it. Upon this question, the Supreme Court said (8 S. Ct. 220):

“Here, it is claimed that the record shows there could be no jurisdiction, because it appears affirmatively that the navigation and railroad company, one of the defendants, was a citizen of the same state with the plaintiff. But the record shows, with equal distinctness, that all the parties were actually before the court, and made no objection to its jurisdiction * * *. Whether in such a case the suit could be removed was a question for the circuit court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the circuit court. The decision of that question was the exercise, and the rightful exercise, of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was

right, in this or any other respect, was to be finally determined by this court on appeal. As the circuit court entertained the suit, and this court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was, at the time of the trial of the present case in the court below, a valid and subsisting prior adjudication of the matters in controversy, binding on these parties, and a bar to this action."

In *Nye v. United States* (4 Cir.), 137 F. 2d 73, the Court, by Judge Parker, said at page 77:

"Whether the suit was or was not one of which the court had jurisdiction, there was certainly power in the court to determine the question of jurisdiction; and even if there was lack of jurisdiction, it is well settled that a judgment based on an erroneous assumption of jurisdiction would not have been void or subject to collateral attack. *Windholz v. Everett*, 4 Cir., 74 F. 2d 834; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 557, 8 S. Ct. 217, 31 L. Ed. 202; *Dowell v. Applegate*, 152 U. S. 327, 14 S. Ct. 611, 38 L. Ed. 463."

In *Stoll v. Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, the Court said:

"* * * where the judgment or decree of the Federal Court determines a right under a Federal Statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court

of its rendition.' (p. 170) * * *. Every court in rendering judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata*. After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation." (P. 172.)

The foregoing cases are decisive of the point under consideration. It is manifest that the District Court erred in holding that, after the former case ran its course in the District Court, the Circuit Court of Appeals, and the Supreme Court without objection to the jurisdiction therein asserted, the United States can now collaterally attack the judgment rendered in said case for want of jurisdiction.

III.

The District Court Erred in Holding That the Finding of the Examiner of Inheritance That Eleuteria Brown Arenas Was Adopted by Guadalupe Arenas in Accordance With the Laws of the State of California and in Accordance With Established Indian Tribal Custom Is Res Judicata of the Issues in the Pending Suit.

As already noted, the judgment of the District Court rests exclusively upon the propositions: (1) That it had no jurisdiction in Action No. 1321 O'C Civil to decide the incidental question involved therein whether Lee Arenas was the sole heir at law of his deceased wife Guadalupe; (2) that having no jurisdiction to decide that issue its judgment was void *ab initio*; and (3) that since its said judgment was void *ab initio*, the finding of the Examiner of Inheritance was properly made and is, therefore, *res judicata* in the pending suit.

Obviously, the learned District Court did not give adequate, if any, consideration to the principles of law discussed under Points I and II, *ante*, to wit:

(1) That the District Court had jurisdiction to determine the right of Lee Arenas to the allotment of his wife Guadalupe and to decide every question incidental or relating to such right; and

(2) That the judgment in the former case, affirmed by this Court and, impliedly, by the United States Supreme Court, cannot be collaterally attacked in the instant action for want of jurisdiction.

The transcript of the proceedings before the Examiner of Inheritance [Deft. Ex. "A"] may be treated here as a judgment roll. The Examiner's "Order Determining

Heirs" of Guadalupe Arenas specifically states that his finding of heirship was "determined in accordance with the laws of the State of California" and that Della Brown Nicholson (Eleuteria Brown Arenas) was "adopted by decedent in accordance with established Indian Tribal Custom." These two findings are demonstrably untrue, as shown by the judgment roll itself.

A. Eleuteria Brown Arenas Was Not Adopted by Guadalupe Arenas in Accordance With the Laws of the State of California.

It may first be noted that the only method by which an adult Mission Indian of California may adopt a minor child is in accordance with the laws of the State of California. This is made absolutely clear by the pertinent provisions of the General Allotment Act of February 8, 1887, 25 U. S. C. A., Section 348, and by the provisions of the Mission Indian Act of January 12, 1891, 26 Stat. 712.

The General Allotment Act, as codified in Title 25 U. S. C. A., Section 348, provides in this connection:

"Upon the approval of the allotments * * * he (the Secretary) shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, *in case of his decease, of his heirs according to the law of the State or Territory where such land is located* * * *." (Italics ours.)

The Mission Indian Act of January 12, 1891, 26 Stat. 712, is to the same effect. Since it applies exclusively to

the Mission Indians of California, its provisions as to heirship are controlling as to members of the Agua Caliente Band of said Indians. Section 5 thereof provides:

“That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, *or, in the case of his decease, of his heirs according to the laws of the State of California* * * *.” (Italics ours.)

It follows from the foregoing statutes that if Eleuteria Brown Arenas was adopted by Guadaloupe, such adoption must have been made “in accordance with the laws of the State of California,” and if not so made there was no legal adoption by virtue of which Eleuteria could inherit from Guadaloupe.

There is no provision in California law for the adoption of a minor child “in accordance with established Indian Tribal Custom.” The Code provisions relating to adoption are found in Sections 221-230 of the California Civil Code, and these provisions are exclusive. Any minor child may be adopted by any adult person, under conditions prescribed (*id.*, Sec. 221), but not without the consent of the living parents, if any (*id.*, Sec. 224) and also consent of the child, if more than 12 years old (*id.*, Sec. 225).

“Any person desiring to adopt a child may for that purpose petition the superior court of the county in which the petitioner resides and the clerk of the

court shall immediately notify the State Department of Social Welfare at Sacramento in writing of the pendency of the action.” (Civ. Code, Sec. 226.)

“The person or persons desiring to adopt a child, and the child proposed to be adopted, must appear before the court. The court must examine all persons appearing before it pursuant to this section, each separately * * *.” (*Id.*, Sec. 227.)

Other provisions of the Civil Code sections mentioned also show that before there can be any adoption the strict provisions of the statute (Civ. Code, Secs. 221-230) must be followed.

The judgment roll of the proceedings before the Examiner of Inheritance [Deft. Ex. “A”] shows on its face that the alleged adoption was not in accordance with the laws of California relating to adoption. Indeed, the judgment roll affirmatively states that Guadaloupe adopted Eleuteria “in accordance with established Indian Tribal Custom,” thus negating the finding that the alleged determination was in accordance with the laws of California.

It should be noted that Eleuteria’s father was living at the time of the alleged adoption, and that his consent thereto does not appear in the record.

The fact that Eleuteria was taken into the home of Lee and Guadaloupe Arenas and that she lived there for a number of years creates no presumption that she was adopted by them.

Romero Estate, 75 Cal. 279;

Parshall v. Parshall, 56 Cal. App. 553;

McCombs Estate, 174 Cal. 211.

In *McCombs Estate, supra*, the Court said, at page 214:

“To establish the child’s right to inherit from the person claimed as an adopting parent, there must be proof of an act of adoption done in strict accordance with the statute. (*Ex parte Clarke*, 87 Cal. 638-641 (25 Pac. 967).) * * *

“The burden of proof is upon her to convince the court of her standing as an adopted child. Proof that she lived with the McCombs and had been treated as a child was not sufficient. (Citing cases.)”

To the same effect, see other cases above cited; I Corpus Juris 1394, Sec. 116; 2 C. J. S. 444, Sec. 52.

The finding of the Examiner that Eleuteria is the adopted child of Guadaloupe in accordance with the laws of the State of California has not an iota of evidence to sustain it; and such finding is directly opposed to the other finding that she was adopted in accordance with established Indian Tribal Custom.

B. Eleuteria Brown Arenas Was Not Adopted by Guadaloupe Arenas in Accordance With Established, or Any, Indian Tribal Custom.

Examination of the judgment roll [Deft. Ex. “A”] shows affirmatively that the Agua Caliente Band of Mission Indians, for more than 50 years, has had no tribal custom for the adoption of any child not of the blood, or not adopted according to law by a member of the tribe. [See affidavits of Clemente P. Segundo and Lee Arenas, part of the judgment roll.] There is no evidence to the contrary. Both Clemente P. Segundo and Lee Arenas have been and are members of the Agua Caliente Band and both have been many times members of the Tribal Business Committee of the Band, hence familiar with

the by-laws, customs, practices, usages and habits of said Band of Indians.

The finding of the Examiner that Eleuteria was adopted by Guadaloupe in accordance with established Indian Tribal Custom is not supported by evidence that any such custom existed, and was an erroneous conclusion of law.

The evidence adduced before, and by, the Examiner of Inheritance makes no reference to any time, place, or tribunal before which Eleuteria was adopted. It refers to no tribal or other records. It consists of hearsay statements, or the inferences or conclusions of a few persons, but nowhere is any fact shown sufficient to warrant the inference that Guadaloupe ever had any intention of adopting Eleuteria. The judgment roll shows that the following testimony was introduced by the Examiner, which is summarized as follows:

Excerpts from the testimony of Henry Pablo, John Mack Razon, Barteziel Rice and Victoria Weirick, taken in 1940 and 1942 in determining the heirs of Rufina Rice, were introduced. Henry Pablo stated that Guadaloupe Arenas had no children of her own "but she adopted a child." John Mack Razon stated that Lee and Guadaloupe had no children of their own "but they adopted a daughter." Barteziel Rice stated that Guadaloupe "reared Della Brown * * * but I can't say of my own knowledge whether the child was adopted in accordance with Tribal Custom or not." Victoria Weirick stated, "I have always understood that she adopted Della Brown but I cannot say for sure that the adoption took place." Other witnesses were Ambrose Gabriel, Loreno Lugo, and Eleuteria herself. Ambrose Gabriel stated that he "saw Lupe and Lee Arenas taking care of her." The Examiner

asked him if *in his opinion* Eleuteria was adopted, to which he said, "Yes, I think so." Lorenzo Lugo stated, "I have always *looked upon* Della Brown Nicholson as the adopted daughter of Guadalupe" and the people around here *regarded* Della as their adopted child, by Indian Custom."

There is not one word of positive, credible evidence (1) that there was a tribal custom for the adoption of a child, or (2) that Guadalupe adopted, or ever intended to adopt, Eleuteria.

Lee Arenas testified at the hearing before the Examiner:

"Q. Did she (Guadalupe) adopt a child? A. No.

Q. Didn't you and Lupe Arenas adopt Della Brown Nicholson, who was also known as Eleuteria, by Indian Custom, when she was a little girl? A. No, we didn't.

Q. When you took Della into your home back in 1917, was it not your intention to rear her as your adopted daughter? A. No, we just took her in and cared for her because she had no mother and her father, Pete Brown, was unable to care for her."

Clemente P. Segundo stated in his affidavit:

"Affiant further states that said Della Brown was enrolled as a member of said tribe of Indians because of her residence in the home of Lee Arenas upon said reservation and of her Indian blood (in another Band) and not because she was ever at any time adopted or recognized by said Guadalupe Arenas, in any manner, or entitled to inherit any property of said Guadalupe Arenas."

Eleuteria was in the home of Lee and Guadalupe Arenas for about ten years. She then returned to the home of her father Pete Brown and remained there until she married Nicholson. The judgment roll does not sus-

tain the finding of the Examiner that Eleuteria was adopted by Guadaloupe in accordance with Tribal Custom, even if such custom had been shown to exist. All of the affirmative evidence on the question is to the effect that there was no such tribal custom; and if there had been, it could not have superseded the Acts of Congress and the laws of the State of California to the contrary.

C. Any Determination of Heirship by the Secretary of the Interior Under 25 U. S. C. A., Section 372, Is Subject to Attack or Review on Account of Fraud, or for Error of Law Upon the Facts Found, or Where There Is No Evidence to Support His Finding on a Material Issue in the Proceeding.

Lee Arenas is not in any sense bound by the finding and so-called adjudication of the Examiner of Inheritance that Eleuteria was adopted by Guadaloupe. Such finding and adjudication are under direct attack in the instant case, and the validity thereof is expressly challenged by the allegations of the complaint. All of which means that Lee Arenas is not bound by any rules of administrative procedure ordinarily applicable to matters adjudicated by some administrative body or officer.

Dixon v. Cox, 268 Fed. 285 (8th Cir.);

Frederick v. Rock Island Sav. Bank, 44 S. D. 477,
184 N. W. 234;

Maz-Ke v. Jefferson Trust Co., 82 Okla. 107, 198
Pac. 319;

Hanson v. Hoffman, 113 F. 2d 780;

Cf. James v. Germania Iron Co., 107 Fed. 507,
600-601;

Howe v. Parker, 190 Fed. 738, 746.

The decision of the Circuit Court of Appeals for the Eighth Circuit in *Dixon v. Cox*, 268 Fed. 285, *supra*, is

directly in point. The opinion of the Court, by Judge Sanborn, states at pages 289-290:

“The second question is: Did the complaint or proof in this suit set forth a cause of action in equity to avoid the Secretary’s decision for fraud, error of law, or absence of substantial evidence to sustain it? Whether or not the weight of evidence in substantial conflict sustains one or the other side of an issue of fact is a question upon which the final decision of the Secretary in a case of this character is generally final and conclusive; but his decision upon this issue of heirship, like the decision of the Land Department, of the Dawes Commission, and of other *quasi* judicial tribunals, may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded, or established beyond dispute at the hearing before him, or on the ground that at the close of such hearing there was no evidence to support his finding on a material issue of fact which controlled the result. *James v. Germania Iron Company*, 107 Fed. 587, 600, 601, 46 C. C. A. 476, 479, 480; *Howe v. Parker*, 190 Fed. 738, 746, 111 C. C. A. 466, 474.”

The Act of June 25, 1910, 25 U. S. C. A., Section 372, was involved in the case, and the above quoted language related to said Act.

The Examiner’s Order Determining Heirs of Guadalupe Rice Arenas is contrary to law and there is no evidence to support his finding that Eleuteria was adopted by Guadalupe either under the laws of California or by tribal custom. The Order comes squarely within the interdiction set forth in *Dixon v. Cox*, and is void on the face of the judgment roll [Deft. Ex. “A”].

IV.

The Act of June 25, 1910 (25 U. S. C. A. Sec. 372) Is Not Applicable in This Case, Because the Authority of the Secretary of the Interior to Determine Heirship Under Said Act Is Limited to Cases Where an Allotment Was Made and a Trust Patent Was Issued to the Indian During His Lifetime and Who Died During the Trust Period.

The District Court erroneously held that it had no jurisdiction to decide the incidental, but necessary, question involved in the former action No. 1321-O'C Civil, to wit, whether Lee Arenas, plaintiff therein, could maintain the action, as the sole heir at law of his deceased wife Guadalupe, to establish his right to the lands selected by her for allotment during her lifetime. Under the facts stated below, we submit that the Court had jurisdiction to decide that question, notwithstanding the provisions of the heirship statute (Act of June 25, 1910, 25 U. S. C. A., Sec. 372).

In 1927 Guadalupe Arenas made and filed with the Special Allotting Agent her selection of lands for allotment in severalty to her. On May 9, 1927, the Allotting Agent made, certified and transmitted a schedule of allotments selected by members of the Agua Caliente Band of Mission Indians to the Secretary of the Interior. The Secretary took no action on said schedule until after the decision of the Supreme Court in *Arenas v. United States* (1944), 322 U. S. 419. Some months thereafter he pretended to disapproved the 1927 schedule. Guadalupe Arenas died in March, 1937, intestate, at which time no allotment had been made to her and, of course, no trust patent had been issued to her. In 1940 Lee Arenas filed

Action No. 1321-O'C Civil in the District Court claiming to be entitled to allotments of land for himself and as the sole heir at law of Guadaloupe. In that case, without objection to the jurisdiction, the District Court made and entered its decree adjudging that Lee Arenas was entitled to the lands selected by him and Guadaloupe in 1927 and to trust patents covering said lands. (60 Fed. Supp. 411.) This Court affirmed, except it held that the trust period should begin to run on and from May 9, 1927. (158 F. 2d 730.) The Supreme Court denied certiorari. (331 U. S. 842.) On July 25, 1949—more than 12 years after Guadaloupe's death, and more than 2 years after the Supreme Court denied certiorari in case No. 1321-O'C Civil—the Examiner of Inheritance pretended to make a determination as to the heirs of Guadaloupe Arenas, and by so doing to nullify the solemn judgments of the District Court, this Court and the Supreme Court. Aside from the obvious lack of *bona fides* on the part of the Department, no such power is granted the Secretary by the Act of June 25, 1910. (See Points I, II and III, *ante*.) We believe that the authorities do not justify the judgment of the District Court holding that it could not determine the heirs at law of Guadaloupe Arenas in action No. 1321-O'C Civil.

THE ACT OF JUNE 25, 1910.

The Act of June 25, 1910, expressly limits the authority of the Secretary to determine heirship. Section 1 of the Act (25 U. S. C. A., Sec. 372) provides:

“When any Indian to whom an allotment has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will

disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.”

At the date of Guadeloupe’s death in 1937 no allotment had been made to her. It is, therefore, clear that she was not in the class of Indians mentioned in the Act of 1910, for at the date of her death no allotment of land had been made to her. The allotment to Lee as her sole heir at law was made by the decree of this Court years after her death.

The distinction between this case and the case contemplated by the Act of June 25, 1910, may be stated as follows: In an action to secure an allotment which has been unlawfully denied to an Indian, the District Court has exclusive jurisdiction of the subject matter and parties to the suit under 25 U. S. C. A., Section 345; in a proceeding to determine the heirs of a deceased Indian, to whom the Secretary has issued a trust patent during the Indian’s lifetime, the Secretary has exclusive jurisdiction under 25 U. S. C. A., Section 372.

The distinction just stated has been recognized, expressly or impliedly, by the federal courts. Most of the cases relate to the exclusiveness of the Secretary’s jurisdiction to determine heirship where Indians had received their allotments and trust patents; these are not in point, and need not be discussed. Other cases draw the distinction mentioned; these are important here.

In *Gerard v. United States*, 167 F. 2d 951 (9th Cir., 1948), the Court said, at page 953:

“The Act of 1901” (codified in 25 U. S. C. A., Sec. 345) “further has provided for suits by Indians

where the Indian wards are 'excluded from * * * any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress'. * * * As to litigation concerning the two classes, claims to allotments to be made and to land already allotted and held under trust patents, the Act's provisions are that the Indians 'may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States.' 31 Stat. 760, 25 U. S. C. A., Section 345.

"The distinction between the provisions of the 1901 Act for suits concerning an Indian's right to an allotment in the first instance and provisions for suit where the trust patent has been issued is recognized in several cases. *Typical were cases brought by Indians to determine who are heirs to land already allotted to an Indian ancestor to whom a trust patent is issued. McKay v. Kalyton*, 204 U. S. 458, 27 S. Ct. 346, 51 L. Ed. 566; *Heckman v. United States*, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820." (Italics ours.)

The same conclusion is reached in *First Moon v. White Tail*, 270 U. S. 243, 46 S. Ct. 246. After quoting the pertinent provisions of the Act of June 25, 1910, the Court said (46 S. Ct. 246):

"We cannot accept the suggestion that the above-quoted exclusive feature of the Act of 1910, was repealed by the Act of December 21, 1911, c. 5, 37 Stat. 46, which amended section 24, Judicial Code (Comp. St. Section 991), and conferred upon District Courts jurisdiction 'of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.'

“This paragraph is but a codification of provisions found in the Act of August 15, 1894, c. 290, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760 (Comp. St. Sections 4214, 4215). *It has reference to original allotments claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment.*” (Italics ours.)

The language of the Act of 1910 (25 U. S. C. A., Sec. 372) and the decisions noted, *supra*, leave no doubt upon the proposition that the Secretary’s authority to determine heirship is limited to cases where the deceased Indian had received an allotment and trust patent thereto prior to decease.

The jurisdictional statute of August 15, 1894, as amended by the Act of 1901 (both carried into 25 U. S. C. A., Sec. 345), provides:

“*All persons * * * of Indian blood or descent who are entitled to an allotment of land * * *, who claim to be so entitled * * *, or who claim to have been unlawfully denied or excluded from any allotment * * * may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any (such) action * * *.*” (Italics ours.)

The Act of August 15, 1894, as amended (25 U. S. C. A., Sec. 345), *supra*, would be meaningless, if the District Court’s decree thereunder, adjudging an Indian’s right to an allotment to lands previously selected but not allotted, can be nullified by an administrative officer’s decision. This is more readily apparent when it is remem-

bered that said Act provides that "the judgment or decree" rendered in an action brought by such an Indian claimant "shall have the same effect, as if such allotment had been allowed and approved by him (the Secretary)."

The position taken herein is not inconsistent with the several statutes involved. Act of August 15, 1894; Act of February 6, 1901; Act of June 25, 1910; and Act of March 3, 1911. These Acts are *in pari materia*. They must be construed together; they must be harmonized, if possible; and each thereof must be given full force and effect, if thereby no violence is done to other such statutes.

Ingels v. Riley, 5 Cal. 2d 154;

Lucas v. City of Los Angeles, 10 Cal. 2d 476;

Raynor v. City of Arcata, 11 Cal. 2d. 113;

59 Corpus Juris 1042 *et seq.*

So considered and construed, the statutes under consideration are harmonious, and form a pattern in accord with the fundamental principle inherent in Indian affairs and rights that "Legislation must be construed in a way most favorable to the Indian." (*Arenas v. United States*, 181 F. 2d 62, 66.)

To hold, under the jurisdictional Act of 1894, as amended (25 U. S. C. A., Sec. 345), that the Court had jurisdiction to adjudge and decree as an indispensable incident to the litigation, that Lee Arenas, as heir at law of his wife, was entitled to the lands selected for allotment by his deceased wife does no violence to the Act of June 25, 1910. On the other hand, to hold that the Secretary could refuse to make or approve allotments, that after years of delay and after the Indian was forced to

bring suit and after judgment had been made and entered making the allotment, he could then overturn and make invalid the judgment, would mean the emasculation of the jurisdictional statute. It is submitted that no such purpose was intended by the Congress in passing these several Acts, and no such result is permissible under the *in pari materia* rule of construction.

Under our construction of these statutes, the Secretary retains all of the power actually granted him to determine heirship, and the district courts retain the jurisdiction granted them to determine the right of any Indian, and of all Indians, to allotments of land claimed by them and to pass upon any and all questions necessary to determine that right. This result is in accordance with any proper concept of jurisdiction, and statutory construction.

Conclusion.

In view of the foregoing, the judgment of the District Court herein is erroneous and should be reversed *in toto*.

Respectfully submitted,

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No. 13012

**In the United States Court of Appeals
for the Ninth Circuit**

LEE ARENAS, APPELLANT

v.

**UNITED STATES OF AMERICA AND ELEUTERIA BROWN
ARENAS, ALSO KNOWN AS DELLA NICHOLSON,
APPELLEES**

**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

BRIEF FOR THE APPELLEES

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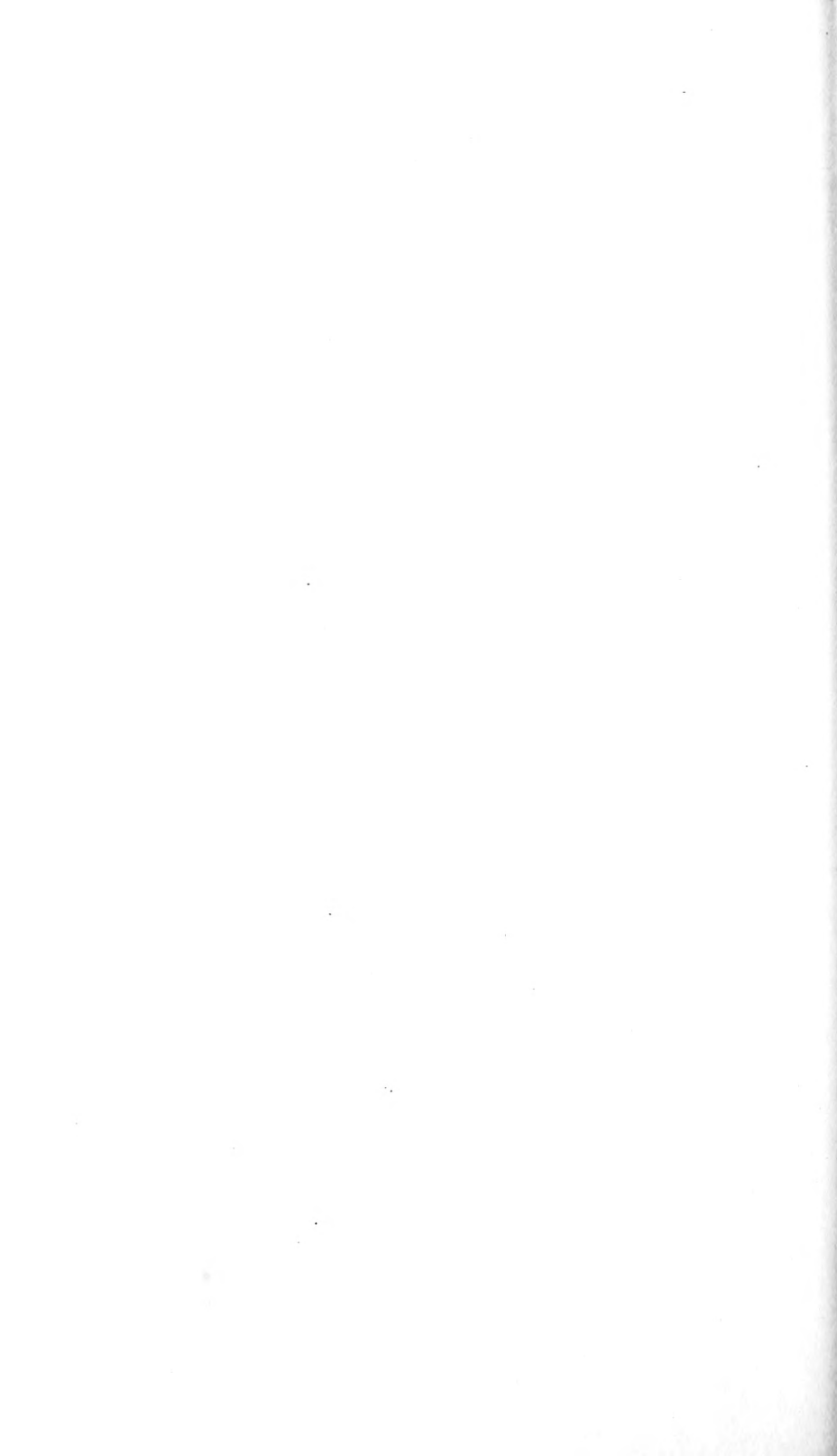
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OPINION BELOW

The district court's opinion (R. 20-52)¹ is reported at 95 Fed. Supp. 962.

JURISDICTION

The jurisdiction of the district court was invoked under section 1 of the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345, and 28 U. S. C. sec. 1353. The district court's judgment was entered March 12, 1951 (R. 86-91). Notice of Appeal was filed April 3, 1951 (R. 92). The jurisdiction of this court rests on 28 U. S. C. sec. 1291.

¹ All references are to pages of the typewritten "Transcript of Record."

STATUTES INVOLVED

So far as is material, section 1 of the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345, provides:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him * * *: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

So far as is material, section 1 of the Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. sec. 372, provides:

When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.

QUESTIONS PRESENTED

Appellant brought suit under the act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345, to secure allotments selected by himself and his deceased wife. He alleged he was her sole heir. A final judgment was entered that he was her sole heir and as such entitled to a trust patent for her allotment. Thereafter, the Secretary of the Interior, pursuant to the act of June 25, 1910, 36 Stat. 855, 25 U. S. C. sec. 372, found that the wife had a daughter by adoption and that she was heir to one-half of the allotment. Appellant brought this suit to cancel the daughter's trust patent as a cloud upon his title. The following questions are presented by the appeal from a decree sustaining her right to the trust patent:

1. Whether the judgment declaring appellant to be sole heir concludes the daughter who was not a party to the suit.

2. Whether the judgment was void because the court was without jurisdiction over the subject matter,

i. e., the ascertainment of heirs of a deceased allottee who died during the trust period.

3. Whether the decision of the Secretary of the Interior that the daughter was an heir of the deceased allottee may be reviewed by the courts.

STATEMENT

Appellant Lee Arenas brought this action against the United States and Eleuteria Brown Arenas, also known as Della Nicholson (and hereafter called appellee). He asked for a judgment (1) canceling a patent whereby the United States conveyed in trust to appellee an undivided one-half interest in lands of the Palm Springs Reservation selected for allotment by his deceased wife Guadaloupe and (2) quieting his equitable title to the lands as sole heir of the dead woman. He alleged that his equitable title as sole heir had been established by the final judgment in an earlier suit brought by him against the United States in the same court (No. 1321 O'C Civil) and that the subsequent trust patent to appellee was repugnant to that judgment (R. 2-10).

Defendants filed an answer (R. 11-19) in which they asserted (R. 16-17) that the judgment in No. 1321 did not bind appellee because she was not a party to that suit and because jurisdiction exclusively and conclusively to determine those entitled to Guadaloupe's allotment was vested in the Secretary of the Interior. And they alleged that the Secretary—by decision of the Examiner of Inheritance assigned to the Palm Springs Reservation—had determined that appellant

and appellee were each entitled to an undivided one-half interest in Guadaloupe's allotment and in consequence had issued to appellee the trust patent of which appellant complained.

When the case came on for trial on February 1, 1951, there were no witnesses. Appellant put in evidence the judgment in No. 1321 and appellees introduced the record made before the Examiner of Inheritance.

On February 19, 1951, the trial court filed its opinion (R. 20-52) and on March 12, 1951, it filed findings of fact (R. 71-80) and conclusions of law (R. 80-84) and entered judgment (R. 86-91).

The facts determinative of this appeal are not controverted. As stated in the opinion (R. 25-29) and in the findings (R. 71-80) they may be summarized as follows:

Appellant is a member of the Agua Caliente Band of the Mission Indians of California and a resident of the Palm Springs Reservation. So was his wife, Guadaloupe, until her death March 26, 1937.

In December 1940, appellant sued the United States to establish *inter alia* that he was entitled to trust patents for (1) an allotment selected by him and (2) an allotment selected by his deceased wife, of whom, so he alleged, he was sole heir. This suit is No. 1321 O'C Civil. It was brought pursuant to section 1 of the act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345. Appellee was not made, nor did she become, a party to the suit. In 1945, the district court entered judgment that, in addition to being entitled to a trust patent effective as of June 21, 1923, for the allotment

selected by him, appellant, as the sole heir of *Guadeloupe*, was entitled to a similar trust patent for the allotment selected by her. In 1946, this Court modified the judgment so as to make the patents effective as of May 29, 1927.²

On February 24, 1949, a trust patent to 47 acres in the reservation was issued to the heirs of *Guadeloupe*. The heirs were not named. The patent declared the United States would hold the land in trust for 25 years from May 29, 1937.

On July 25, 1949, under authority conferred on the Secretary of the Interior by section 1 of the act of June 25, 1910, 36 Stat. 855, 25 U. S. C. sec. 372, the Examiner of Inheritance assigned to the *Palm Springs Reservation* held that as daughter of *Guada-*

² To refresh the memory of the Court the litigation in No. 1321 O'C Civil is summarized as follows:

At first, appellant's complaint was dismissed on the ground that the case was ruled by this Court's earlier decision in *St. Marie v. United States*, 108 F. 2d 876 (1940), certiorari denied because not applied for in time, 311 U. S. 652. This Court affirmed the judgment of dismissal. 137 F. 2d 199 (1943). The Supreme Court granted certiorari and reversed directing that the Government be required to answer the complaint. 322 U. S. 419 (1944).

After the Government answered, there was a trial and judgment for appellant. 60 F. Supp. 411 (1945). The Court affirmed with a modification the judgment insofar as it awarded appellant allotments on account of his selection and that of *Guadeloupe*, but reversed so much of the judgment as awarded him allotments on account of his dead father and brother. 158 F. 2d 730 (1946). The Supreme Court denied appellant's petition for certiorari seeking review of the latter part of this Court's judgment and accordingly denied the Government's petition asking that, if appellant's petition was granted, the Court also review the part of the judgment holding he was entitled to allotments for himself and *Guadeloupe*. 331 U. S. 842 (1947).

loupe, adopted "in accordance with the established Indian Tribal Custom," appellee was "entitled to an undivided one-half interest of the allotment covered by the trust patent to the heirs of Guadalupe."³ Appellant was held entitled to the other half interest. He was notified of the decision the same day and advised that it would become final unless a petition for rehearing was filed within 60 days. He did not apply for rehearing. Accordingly, on November 8, 1949, the United States issued a trust patent to appellee declaring her the owner of an undivided half interest in Guadalupe's allotment.

Upon the basis of the foregoing facts, the trial court concluded as a matter of law (R. 80-84) that the judgment in No. 1321 insofar as it purported to determine that appellant was sole heir of Guadalupe was void because exclusive jurisdiction to determine that matter was vested in the Secretary of the Interior and because appellee was not a party to the suit. The court further concluded that the decision of the Examiner of Inheritance determining that the heirs of Guadalupe were appellant and appellee and that each was entitled to a trust patent for an undivided half interest in Guadalupe's allotment was binding on the parties and *res adjudicata* of the issues presented by this suit.

³ On May 19, 1949, notices had been mailed to appellant and appellee and posted in five public places announcing that a hearing would be held at the Indian Office at Palm Springs on the following June 8 at 1:00 p. m. to determine the heirs of the late Guadalupe Arenas. There was a hearing at the time and place specified in the notice. Lee and Eleuteria appeared at the hearing and participated therein (Fdg. VIII, R. 77-78).

Accordingly the court entered judgment (R. 86-91) enjoining appellant from interfering with appellee's possession, use, and enjoyment of her share of the allotment and from interfering with the Government's performance of the duties imposed upon it in connection with the trust patent.

ARGUMENT

I

Appellee is not bound by the judgment in No. 1321

No one is concluded by the judgment entered in a suit to which he is not a party. Appellee was not a party in No. 1321. Therefore, she was not deprived of her rights as an heir of Guadaloupe by the judgment entered in that suit declaring that appellant was the sole heir.

To avoid the impact of the foregoing, appellant points out that the United States, which *was* in No. 1321, was also trustee of appellee and asserts that in "a large and we believe controlling sense, [whatever that may mean] she * * * by virtue of privity, is likewise bound through her trustee" (Br. 16). The assertion does not deserve consideration. In suing the United States as sole heir of Guadaloupe for a trust patent for her allotment, appellant did not allege that appellee claimed to be part heir of Guadaloupe. It is obvious therefore that he did not call on the United States to represent appellee and also that in fact she was not represented. Consequently, the assertion has no substance and its acceptance would be utterly unjust to appellee. Indeed, this Court has hitherto held

that in defending a suit brought under the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C., sec. 345 (as was the situation in No. 1321), the United States does not represent Indian wards who are not named in the complaint and hence that these wards are not concluded by the judgment entered in the suit. *Ya-Koot-Sa v. United States*, 262 Fed. 398 (1920). It is clear therefore that as heir to Guadaloupe appellee was not represented in No. 1321 and so is not bound by the judgment therein.

II

The district court had no power to determine the heirs of Guadaloupe

Section 1 of the Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. sec. 372 provides: "When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, * * * the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive." Thus, the 1910 Act required the Secretary of the Interior to ascertain the legal heirs of an Indian allottee who dies during the trust period. Its enactment ended pending suits to ascertain heirs of dead allottees holding under trust patents, prevented institution of future suits for that purpose, and prohibited judicial examination or revision of the Secretary's decisions in such cases. *Hallowell v. Commons*, 239 U. S. 506,

508 (1916); *Lane v. Mickadiet*, 241 U. S. 201, 209, *et seq.* (1916); *United States v. Bowling*, 256 U. S. 484 (1921); *First Moon v. White Tail*, 270 U. S. 243, 244 (1926).

Appellant contends that nonetheless in No. 1321 the district court ascertained that he is the sole legal heir of Guadalupe—an Indian allottee who died during the trust period—and that its judgment is conclusive. He relies (Br. 16–20) on the fact that the judgment has become final and invokes the rule that a final judgment cannot be collaterally attacked, even if the court has erroneously assumed or held that it had jurisdiction. See e. g., *Des Moines Nav. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 557, *et seq.* (1887); *Dowell v. Applegate*, 152 U. S. 327, 340 (1894); *Stoll v. Gottlieb*, 305 U. S. 165, 171 (1938).

But that rule applies only where the court has the power to, indeed is required to, determine whether it has jurisdiction. Consequently its assumption or conclusion in favor of jurisdiction is merely erroneous and so does not make void its final judgment. Accordingly, it is well-settled that a Federal court has power to determine the existence of diversity of citizenship and of the requisite jurisdictional amount. Similarly, an equity court has power to determine the want of an adequate remedy at law. Final judgments following such determinations are unassailable.

However, a “court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted it by its creators.” *Stoll v. Gottlieb*, 305 U. S. 165, 171 (1938).

Where the court has no power over the subject matter sought to be litigated, i. e., to decide the issues raised by the pleadings, it is not authorized to determine that it has and its judgment purporting to pass on the subject matter is a nullity. No one, we assume, would think that the decree of a Federal court purporting for example to grant a divorce became valid if it happened to become final. As the Supreme Court said in *Elliott v. Piersol*, 1 Pet. 328, 340-341 (1828):

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.

In *Elliott v. Piersol*, the court found that a State court was not empowered by statute to approve a certificate of its clerk and hence that its judgment was void. Similarly void were a Land Department

decision disposing of land which Congress had said should be kept (*Wilcox v. Jackson*, 13 Pet. 498, 511 (1839)), a State court judgment validating an inchoate Spanish title (*Hickey's Lessee v. Stewart*, 3 How. 750, 762 (1844)), a State court judgment in a case occurring beyond the limits of the territorial jurisdiction conferred on it by statute (*Thompson v. Whitman*, 18 Wall. 457, 467 (1873)), and a Federal court injunction restraining a municipality from removing one of its officers. *In Re Sawyer*, 124 U. S. 200, 220-222 (1888). In the case last cited, the Court speaking through Mr. Justice Gray said:

We do not rest our conclusion in this case, in any degree, upon the ground, suggested in argument, that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the Circuit Court; because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. * * * *Des Moines Navigation Co. v. Iowa Homestead Co.*, 123 U. S. 552.

Neither do we say that, in a case belonging to a class or subjects which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity, in deciding that in the particular matter before it there could be no full, adequate and complete remedy at law, will render its decree absolutely void.

But the ground of our conclusion is, that, whether the proceedings of the city council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which the Circuit Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by injunction the tribunals and officers of the State and city from trying and determining.

Congress, by enactment of the act of June 25, 1910, 36 Stat. 855, 25 U. S. C., sec. 372, has withheld from the courts the power to ascertain the legal heirs of Indian allottees who die during the trust period. Consequently, the district court was not authorized to ascertain the legal heirs of Guadaloupe. In purporting to do so, it acted on subject matter over which it had no jurisdiction. In consequence, its judgment that appellant was sole legal heir of Guadaloupe is, as the court below held, a nullity.

Appellant contends (Br. 30-36) however that the 1910 act does not apply where it is necessary to sue under the act of February 6, 1901, 31 Stat. 760, 25 U. S. C., sec. 345 (p. 2, *supra*), to secure an allotment and the Indian dies before judgment is entered establishing his rights. He argues that in such a situation the court which has entertained the suit under the 1901 act may proceed to ascertain the legal heirs of the deceased allottee. Neither reason nor authority supports the contention.

On the contrary, when regard is had to the unqualified direction of the 1910 act that the Secretary of the Interior "shall" ascertain the heirs (see also *Hallowell v. Commons*, 239 U. S. 506, 508) and to the absence from the 1901 act of any provision even remotely suggesting that in cases brought under it the court should make the finding, it is evident that the contention depends for its validity upon arbitrarily limiting the plain meaning of the 1910 act, finding an exception—not expressed in the statute—to the Secretary's jurisdiction, and upon enlarging by implication the 1901 act. These distortions are quite unnecessary. The right of a deceased allottee to an allotment can be established by one suing in a representative capacity and hence the 1901 act can be given full effect without the court going on to an inquiry as to the allottee's heirs. On the other hand, since the court's judgment in favor of the allotment has the same effect "as if such allotment had been allowed and approved by him" as the 1901 act provides, the Secretary thereafter is in as good position to ascertain the heirs as if he had made the allotment of his own volition. Here, for instance, it is plain that the judgment in No. 1321 that Guadalupe was entitled to an allotment could have been made without the further attempt to determine that appellant was her sole heir. It is equally plain that the judgment in No. 1321 did not as a practical matter preclude or even hinder the Secretary in exercising his functions under the 1910 act.⁴

⁴ Appellant contends also (Br. 10-16) that in No. 1321 the court had power to determine the heirs of Guadalupe pursuant to the principle (Br. 11) that "where a court, and especially a court of

In other words, contrary to appellant's contention (Br. 35) the two statutes may be "harmonized" by reading them as they are written.

Appellant's contention is equally unsupported by judicial authority. The first case cited by him, *Gerard v. United States*, 167 F. 2d 951 (C. A. 9, 1948) holds that the act of 1901 permits Indians to sue the United States to establish the invalidity of fee patents issued to them without their consent. The other, *First Moon v. White Tail*, 270 U. S. 243 (1926) (see p. 10, *supra*) holds that suit may not be maintained to set aside the Secretary's determination of the heirs of a deceased allottee under the act of 1910.

It is clear, therefore, that the jurisdiction to award allotments to Indians vested in the district courts by the 1901 act does not divest the Secretary of the Interior of the exclusive jurisdiction to ascertain the heirs of allottees who die during the trust period, conferred by the 1910 act.

III

The decision of the Secretary of the Interior that appellee is heir of Guadaloupe Arenas may not be reviewed by the courts

Appellant correctly states (Br. 22) that the Examiner of Inheritance held that the heirs of Guada-

equity, *has jurisdiction of the parties and subject matter of an action*, it has the right and power to decide every question which necessarily occurs in the cause." [Emphasis supplied.] But, as has been shown (pp. 9-13 *supra*) the court in No. 1321 lacked jurisdiction over appellee and over the subject matter of heirship and consequently the principle invoked does not apply. Furthermore, as appears just above, the question of heirship did not have to be decided in No. 1321.

loupe "determined in accordance with the laws of the State of California" were appellant and appellee, the latter being a "daughter (adopted by decedent in accordance with established Indian Tribal Custom)." (See Fdg. IX, R. 78-79; Deft's Ex. A).

Appellant contends (Br. 21-29) that the Examiner's decision is erroneous and that he is not concluded thereby. But, as the Statement points out (p. 7 supra), appellant did not avail himself of the opportunity to have the Examiner's decision reviewed, and thus failed to exhaust his administrative remedies. Consequently—even assuming that the correctness of the decision presented a question which the courts could decide—it cannot be raised by appellant. *Milheim v. Moffat Tunnel Dist.*, 262 U. S. 710, 723 (1923); *McGregor v. Hogan*, 263 U. S. 234, 238 (1923); *Goldsmith v. Bd. of Tax Appeals*, 270 U. S. 117, 123 (1926).

Even apart from the foregoing the contention may not be considered. The allotment is held in trust by the United States under the administration of the Secretary of the Interior. So long as this continues, the courts have no power to question that official's administration of the allotted property. His determination of the heirs is, by the act of June 25, 1910, made "final and conclusive." As the Supreme Court has said: "The words 'final and conclusive' describing the power given to the Secretary * * * must be treated as absolutely excluding the right to review in the courts * * * the question of fact as to who were the heirs of an allottee, thereby causing that question to become one within the final and conclusive

competency of the administrative authority.” *Lane v. Mickadiet*, 241 U. S. 201, 209 (1916).

The cases cited by appellant (Br. 28) did not concern property under the control of the Secretary of the Interior. Thus, *Dixon v. Cox*, 268 Fed. 285, 289-290 (C. A. 8, 1920) upon which appellant leans (Br. 28-29) involved property which had ceased to be restricted. Legal title had vested in the defendant, whom the Secretary during the trust period had found to be the heir of a deceased allottee. Plaintiffs sought to avoid the Secretary's decision by imposing upon the property a trust in their favor. It was in this context that the court in the passage quoted by appellant stated that the Secretary's decision could be “avoided” by proof that it was induced by fraud or error of law or that it was unsupported by evidence.⁵

Hanson v. Hoffman, 113 F. 2d 780 (C. A. 10, 1940) also cited by appellant, was a suit to invalidate a will which had been approved by the Secretary of the Interior disposing of property still under restric-

⁵ Earlier in its opinion, the court said (268 Fed. at p. 288) that:

* * * the question of the validity and effect of that act [act of June 25, 1910] and of the jurisdiction of the Secretary of the Interior to hear, ascertain and decide who were the parties entitled by descent to the allotments of deceased Indians described therein, has been repeatedly considered and conclusively determined by the Supreme Court and by other Federal courts, and they have uniformly sustained the act, the power of the Congress to enact it, the jurisdiction of the Secretary to decide the questions of heirship, and the finality of his decisions.

tion and of other property freed of restriction. The court held that the property freed of restriction could be impressed with a trust in favor of one complaining of the Secretary's approval if in fact that action was induced by extrinsic fraud. However, so far as concerned property still under restriction, the court held that the Secretary's action could not be reviewed.

In any event, the decision of the Examiner of Inheritance was correct. Section 5 of the act of January 12, 1891, 26 Stat. 712, 713, provides that the trust patents covering the allotments shall declare that for 25 years the United States will hold the land in trust for the allottee or, in the case of his decease, "his heirs according to the laws of the State of California." Appellant contends (Br. 22-25) that the 1891 act required that appellee be adopted pursuant to the provisions of the California Civil Code in order to inherit from Guadaloupe and says—correctly enough—that the Code does not provide for the adoption of a minor child "in accordance with established Indian Tribal Custom."

The 1891 act does not contain this requirement. It requires only that the allotted lands shall pass according to the California succession or descent statutes. The California statutes in respect of adoption are not succession or descent statutes. Rather they prescribe the method whereby a status is created. *Estate of Grace*, 88 C. A. 2d 956, 959, 200 P. 2d 189 (1949).

Section 5 of the 1891 act here involved is the same

as an 1882 act concerning allotments to Omaha Indians in Nebraska. In *Hallowell v. Commons*, 210 Fed. 793 (C. A. 8, 1914), affirmed 239 U. S. 506 (1916), the court while declining to determine the heirs of a deceased allottee because of the act of June 25, 1910, discussed the status of the child of a polygamous marriage. While Nebraska law prohibited such a marriage and made its offspring illegitimate, it was permitted by tribal custom. The court said (p. 800):

The right of [the child] to be considered an heir according to the laws of Nebraska is in no wise dependent upon her parents having been married according to the laws of Nebraska. This Indian tribe at the date of the marriage * * * was a semi-independent power, and, though dwelling within the State of Nebraska, it could make no laws affecting the customs among these Indians, and least of all could any laws on marriage of Nebraska have any effect among the members of such Indian tribe.

So also appellee's right to be considered an heir of Guadalupe according to the laws of California is in no wise dependent upon her being adopted according to the laws of that State. It is enough that, as the Examiner of Inheritance determined, she was adopted "in accordance with established Indian Tribal Custom." By adoption in this manner, she attained a status which under the California statutes of descent and succession made her the heir of Guadalupe.

Consequently, the Examiner's determination of heirship was in accord with California law.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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SEPTEMBER 1951.

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IN THE

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FOR THE NINTH CIRCUIT

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Appellees.

Appeal from the United States District Court for the
Southern District of California

REPLY BRIEF OF APPELLANT.

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FILED



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No. 13012.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

UNITED STATES OF AMERICA and ELEUTERIA BROWN
ARENAS, also known as DELLA NICHOLSON,

Appellees.

REPLY BRIEF OF APPELLANT.

Statement.

Appellees contend (1) that "Appellee (Eleuteria Brown Arenas) is not bound by the judgment in No. 1321;" (2) that "The district court had no power to determine the heirs of Guadalupe;" and (3) that "The decision of the Secretary of the Interior that appellee (Eleuteria) is heir of Guadalupe Arenas may not be reviewed by the courts." All of these questions are discussed in appellant's opening brief. In view of the position taken by appellees, however, further discussion is necessary.

ARGUMENT.

I.

The United States Is Bound by the Former Judgment.

The United States does not claim that it is not bound by the judgment in Case No. 1321. It claims only that Eleuteria Brown Arenas is not bound by said judgment, because she was not a party to the suit wherein it was rendered.

If the United States is bound by said judgment, as tacitly conceded, then its officers and agents are also bound thereby. The Secretary of the Interior, as an officer of the Government, is bound by that judgment; and, therefore, he was without right to make determinations of heirship contrary thereto. The judgment in Case No. 1321 is a valid and binding judgment against the United States. (See authorities cited in the Opening Brief, pages 11-16.) Moreover, the attack now made by the United States on said judgment is a collateral attack not permitted under well settled rules of law. (See Op. Br. pp. 16-20.)

It is immaterial whether or not Eleuteria is bound by the former judgment. The record in this case shows affirmatively, and beyond any question, that she was not the natural, or the adopted, daughter of Guadalupe Arenas, hence was not an heir of Guadalupe. [See Defendants' Exhibit "A."]

II.

The District Court Had Power to Determine That Lee Arenas Was the Sole Heir of Guadalupe.

Appellees disregard the fact that the adjudication in the former judgment, namely, that Lee Arenas was the sole heir of Guadalupe, was incidental, but necessary, to a judicial determination of his right to the lands selected by her for allotment. They also ignore the point made by appellant (Op. Br. p. 30) that the authority of the Secretary of the Interior to determine heirship is limited to cases where an allotment was made and a trust patent was issued to the Indian during his, or her, lifetime and who died during the trust period. We submit that the proper distinction between an ordinary heirship proceeding, where the Secretary has exclusive jurisdiction, and that involved herein was made by this Court in *Gerard v. United States*, 167 F. 2d 951, 953, and in the other cases cited in the opening brief, pages 33-35.

The position taken by the United States, if sustained, would lead to the illogical conclusion that a court of equity having jurisdiction of the parties and of the subject matter of the suit cannot decide questions which necessarily arise in the cause, that is. questions necessary to a decision. This is not and has never been the law in the United States. For more than a century it has been settled law "that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause." (*Peck v. Jenness*, 48 U. S. 612, 12 L. Ed. 841. See other cases cited, to like effect, at pp. 11-15, Op. Br.)

III.

The Determination of Heirship by the Secretary of the Interior May Be Reviewed by the Courts Because of Fraud, or for Error of Law Upon the Facts Found, or Where There Is No Evidence to Support the Determination.

The Examiner of Inheritance is appointed by and acts for the Secretary of the Interior in matters pertaining to Indian heirship. His act is the act of the Secretary. Neither is sacrosanct.

Appellees have advanced the customary departmental contention that appellant has not exhausted the administrative remedy of appeal from the determination of the Examiner of Inheritance, hence, they say in effect that the absolute invalidity of that determination cannot now be challenged. No such conclusion is justified by the facts and the law of this case.

The Act of June 25, 1910, as amended (28 U. S. C. A., Section 372) provides:

“When any Indian to whom an allotment of land has been made * * * dies before the expiration of trust period * * * the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.”

Any determination of heirship made under this statute is, and of necessity must be, the act of the Secretary. The Act does not provide for any appeal from his determination; on the contrary, it is made final and conclusive.

If the Secretary chooses to act through a subordinate, or agent, as was done in this case, the act of such sub-

ordinate, or agent, is the act of the Secretary. It is begging the question to say that an appeal must be taken from the agent's action, notwithstanding the fact that the Act makes no provision or requirement for an appeal.

The cases cited by appellees are not in point. In each such case the aggrieved party had a statutory right and duty to appeal. No such right or duty exists here.

Appellees assert that as long as the United States holds an allotment in trust the courts have no power to question the administration thereof by the Secretary of the Interior. They then say "his determination of the heirs is * * * 'final and conclusive'." They ignore the cases holding that

"his decision upon the issue of heirship * * * may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded, or established beyond dispute at the hearing before him, or on the ground that at the close of such hearing there was no evidence to support his finding on a material issue of fact which controlled the result."

Dixon v. Cox, 268 Fed. 285, 289-290.

See, also, other cases cited in Opening Brief, pages 28-29, to the same effect.

In the instant case the order of the Examiner of Inheritance determining that Eleuteria was adopted by Guadeloupe is challenged. [Tr. p. 7, lines 1-17.] In the Opening Brief, pages 22-28, it is shown that there is no evidence showing, or tending to show, that Guadeloupe adopted Eleuteria under the laws of the State of California or in accordance with Indian tribal custom. All of the affirmative and positive evidence shows that there was no tribal custom in respect to adoption of a minor by a

member of the Palm Springs Band, and that Guadaloupe never intended to adopt and did not adopt Eleuteria. [See Defendants' Exhibit "A," and Op. Br. pp. 26-27.]

There can be no doubt that the Examiner erred in his holding that Guadaloupe adopted Eleuteria in accordance with established, or any, Indian tribal custom. It is equally certain that he erred in holding that Eleuteria was an heir of Guadaloupe "in accordance with the laws of the State of California." Since Eleuteria was not related by blood to Guadaloupe, the Examiner's conclusion that she was an heir must rest solely upon the alleged adoption. If there was no adoption, then Eleuteria could not be an heir of Guadaloupe.

The record [Exhibit "A"] negatives the claim of adoption. The determination that Eleuteria was adopted by Guadaloupe has no support in the evidence, and for that reason it may and should be held invalid by the courts. The so-called exclusive jurisdiction of the Secretary does not preclude judicial review of a determination of heirship that rests on fraud or error of law under the facts, or where it is not supported by the facts. At least two of these grounds exist in this case.

The judgment should be reversed.

Respectfully submitted,

JOHN W. PRESTON,
JOHN W. PRESTON, JR.,
OLIVER O. CLARK,
JACK M. MILLS,
DAVID D. SALLEE,

Attorneys for Appellant.

No. 13013

United States
Court of Appeals
for the Ninth Circuit.

THOMAS JONES,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska
Fourth Judicial Division

FILED

SEP 10 1951



No. 13013

United States
Court of Appeals
for the Ninth Circuit.

THOMAS JONES,

Appellant,

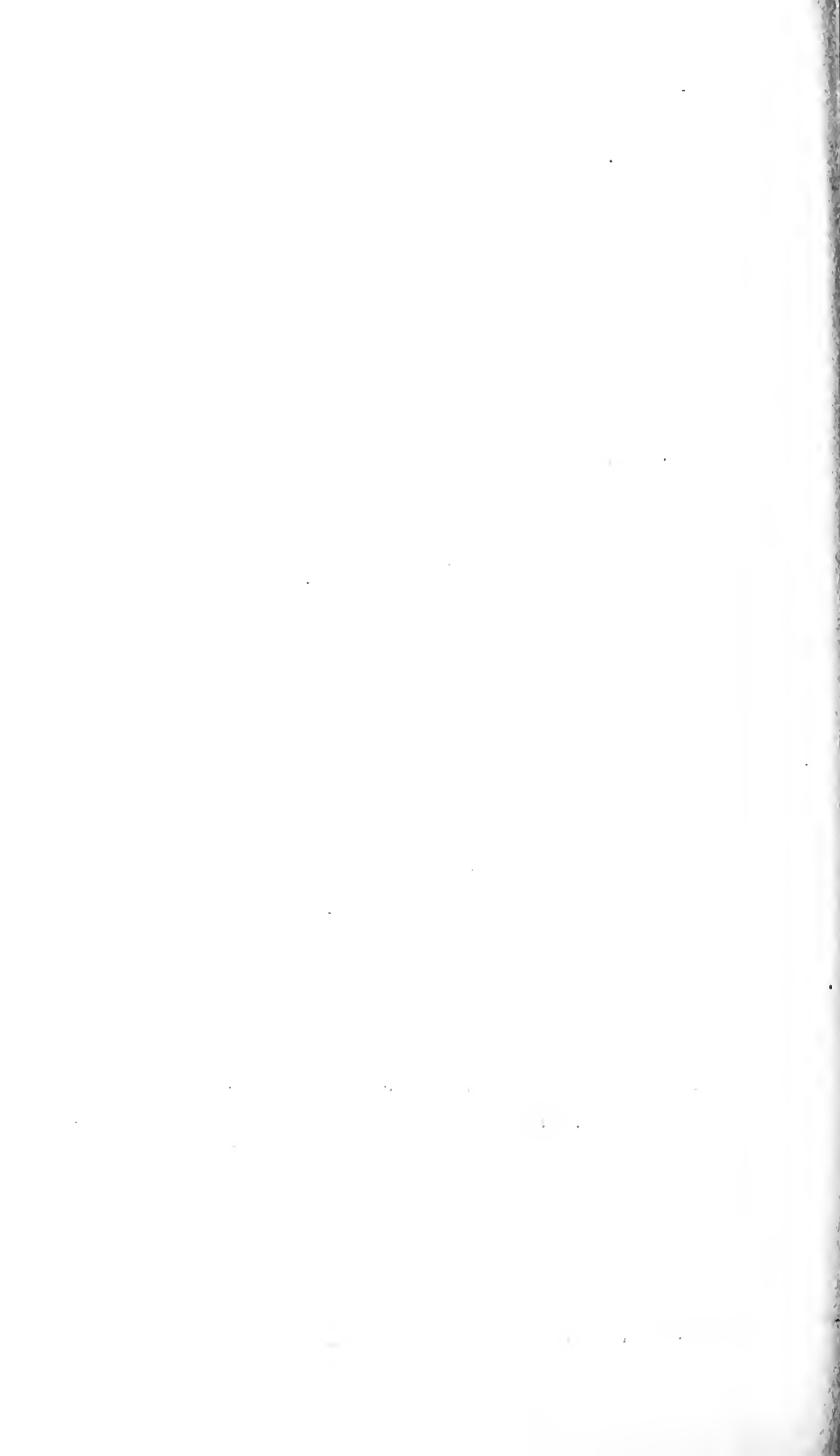
vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

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Fourth Judicial Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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WARREN A. TAYLOR,

Fairbanks, Alaska,

Attorney for Defendant Jones & Appellant.



In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 6681

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELL KELLY and THOMAS JONES,

Defendants.

COMPLAINT IN EJECTMENT

Comes now the United States of America, a sovereign, acting by and through Everett W. Hepp, United States Attorney, and Hubert A. Gilbert, Assistant United States Attorney, in and for the Fourth Judicial Division, Territory of Alaska, acting under instructions of the Attorney General of the United States, and for cause of action alleges:

I.

That the plaintiff is now, and for more than fifty (50) years last past has been, the owner in fee simple of the following described real property, situate in the Fairbanks Recording District, Fourth Division, Territory of Alaska, to wit:

NW $\frac{1}{4}$, Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, containing 160 acres;

and that said lands are embraced within a Withdrawal of Public Land in Aid of Flood Control, Alaska, by Executive Order No. 8020, dated December 2, 1938.

II.

That the plaintiff is entitled to the immediate possession of said lands; and that said defendants, Nell Kelly and Thomas Jones, have at all times since about the year 1942, unlawfully withheld, and do now unlawfully withhold, the possession of said lands from the said plaintiff.

Wherefore, the plaintiff demands judgment against the defendants, jointly and severally, for the recovery of the possession of said lands above described, together with the improvements thereon, for its costs and disbursements herein, and for a reasonable sum to be allowed by the Court as an attorneys' fee herein.

/s/ EVERETT W. HEPP,
United States Attorney.

/s/ HUBERT A. GILBERT,
Ass't United States Attorney.

[Endorsed]: Filed Jan. 9, 1951.

[Title of District Court and Cause.]

ANSWER

Comes Now Thomas Jones, one of the above-named defendants, and for answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Not having sufficient information upon which to

base a belief as to the allegations constained in paragraph 1, the defendant denies the same.

II.

The defendant denies each and every allegation of paragraph 2 of plaintiff's complaint.

Wherefore, defendant prays that plaintiff take nothing by its action.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

Service acknowledged.

[Endorsed]: Filed Feb. 23, 1951.

[Title of District Court and Cause.]

ANSWER

Comes Now Nell Kelly, one of the above-named defendants, and for answer to plaintiff's complaint,

I.

Denies each and every allegation contained in paragraph 1 of plaintiff's complaint.

II.

Denies each and every allegation contained in paragraph 2 of plaintiff's complaint.

Wherefore, Defendant Kelly prays plaintiff take nothing from its complaint; for her costs and dis-

bursements herein; and a reasonable sum as and for attorney fees.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant
Nell Kelly.

Service acknowledged.

[Endorsed]: Filed March 1, 1951.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now Thomas Jones, one of the above-named defendants, and for answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Not having sufficient information upon which to base a belief as to the allegations contained in paragraph 1, the defendant denies the same.

II.

The defendant denies each and every allegation of paragraph 2 of plaintiff's complaint.

And for an affirmative defense to plaintiff's complaint, defendant, Thomas Jones, alleges as follows:

I.

That upon the 4th day of March, 1948, defendant entered upon the said lands described in plaintiff's complaint, by virtue of the terms of a certain lease

to said lands executed by Nell Kelly, co-defendant in this action, which said lease was for a period of five years from March 4, 1948, to March 4, 1953, with an option to renew for a further period of five (5) years.

II.

That the defendant thereupon entered upon said lands and improved the said premises and expended the sum of approximately \$50,000.00 for said improvements.

III.

That at the time of the execution of said lease, defendant believed that the said Nell Kelly was the owner of and entitled to the possession of said lands and was in all respects qualified to execute a lease of said premises and the improvements on said lands at the time of the execution of said lease.

IV.

That in said lease the description of said premises was erroneously given as the

SW $\frac{1}{4}$ of Section 20, T 2 S, R 3 E, Fairbanks Meridian where the description should have been

SW $\frac{1}{4}$ of Section 27, T 2 S, R 3 E, Fairbanks Meridian.

V.

That defendant will suffer irreparable injury and loss by eviction from said premises for the improvements placed upon said premises are permanent in character and cannot be removed by this defendant.

Wherefore, having answered plaintiff's complaint,

defendant prays that the plaintiff's complaint be dismissed.

/s/ WARREN A. TAYLOR,
Attorney for Defendant
Thomas Jones.

United States of America,
Territory of Alaska—ss.

Thomas Jones, being first duly sworn upon his oath, deposes and says: That I am one of the defendants in the above-entitled action, that I have read the foregoing amended answer, know the contents thereof, and that the same are true as I verily believe.

/s/ THOMAS A. JONES.

Subscribed and Sworn to before me this 27th day of April, 1951.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public for the
Territory of Alaska.

My commission expires 8/11/51.

Lodged April 27, 1951.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause do from the law and the evidence therein find that at the time this action was commenced, to wit: January 9, 1951, and for many years theretofore and at all times thereafter the plaintiff was and is the owner in fee simple and entitled to the immediate possession of the property described in the complaint herein, to wit: NW $\frac{1}{4}$ Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, Alaska.

Dated at Fairbanks, Alaska this 27th day of April, 1951.

/s/ ERNEST JOHNSON,
Foreman.

Entered in Court Journal, No. 42, page 58, April 27, 1951.

[Endorsed]: Filed April 27, 1951.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6681

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELL KELLY and THOMAS JONES,

Defendants.

JUDGMENT

Be It Remembered, that upon the 23rd, 24th and 27th days of April, 1951, the above-entitled cause came on regularly for trial. The plaintiff appeared by its attorneys of record, and the defendants appeared in person and by their attorneys of record. Evidence was introduced and upon the 27th day of April, 1951, the jury returned its verdict in words and figures as follows:

“We, the jury, duly empanel and sworn to try the above-entitled cause do from the law and the evidence therein find that at the time this action was commenced, to wit: January 9, 1951, and for many years theretofore and at all times thereafter the plaintiff was and is the owner in fee simple and entitled to the immediate possession of the property described in the complaint herein, to wit: NW $\frac{1}{4}$ Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, Alaska.

“Dated at Fairbanks, Alaska this 27th day of April, 1951.

“/s/ ERNEST JOHNSON,
“Foreman.”

Wherefore, It Is Hereby Adjudged that the plaintiff, United States of America, is owner in fee simple and entitled to have and recover from said Nell Kelly and Thomas Jones, defendants, the immediate possession of the following described lands: NW¼ Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, Alaska, including all improvements located thereon.

It Is Further Adjudged that the plaintiff recover from the defendants its costs and disbursements herein expended in the sum of \$67.18, to be taxed by the Clerk of the Court.

Dated at Fairbanks, Alaska, this 27th day of April, 1951.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal, No. 42, page 59, April 27, 1951.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Thomas Jones, one of the defendants above named, hereby appeals to the

United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 27th 1951.

/s/ WARREN A. TAYLOR,
Attorney for Appellant
Thomas Jones.

Service acknowledged.

[Endorsed]: Filed June 5, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the District Court for the Territory of Alaska, Fourth Division.

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by the defendant, Thomas Jones, in the above-entitled cause, the complete record (including this designation) and all the proceedings and evidence in said cause, prepared and transmitted as required by law and by rules of said Court.

/s/ WARREN A. TAYLOR,
Attorney for Defendant
Thomas Jones.

Receipt of Copies acknowledged.

[Endorsed]: Filed June 13, 1951.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6681

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NELL KELLY and THOMAS JONES,
Defendants.

APPEARANCES

EVERETT W. HEPP,
United States Attorney,
Of Fairbanks, Alaska,
Attorney for Plaintiff.

HUBERT A. GILBERT,
Assistant United States Attorney,
Of Fairbanks, Alaska,
Attorney for Plaintiff.

GEORGE B. McNABB, JR.,
Of Fairbanks, Alaska,
Attorney for Defendant, Nell Kelly.

WARREN A. TAYLOR,
Of Fairbanks, Alaska,
Attorney for Defendant, Thomas A. Jones.

PROCEEDINGS

Be It Remembered, that upon the 23rd day of
April, 1951, at the hour of 10:00 o'clock a.m., the

trial of the above-named cause came on regularly for hearing, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: This was the time set for trial in the case of United States versus Kelly and Jones.

Mr. Gilbert: Yes, your Honor.

The Court: Defendants represented here?

Mr. Gilbert: Their attorneys are not here, your Honor.

The Court: Are you representing the defendants in this case, Mr. McNabb?

Mr. McNabb: I am representing Mrs. Kelly, your Honor, who has not put in an appearance.

The Court: Well, it was regularly set for trial.

Mr. McNabb: That's true, your Honor.

The Court: And how about the other defendant?

Mr. McNabb: Mr. Taylor is representing him, your Honor. I can find neither Mr. Taylor nor his client. He was here a few minutes ago. I was attempting to find Mr. Taylor.

The Court: He was around here, was he?

Mr. McNabb: Yes, your Honor, Mr. Taylor was.

The Court: Counsel ready to proceed and choose the jury in the case of United States versus [2*] Kelly and Jones?

Mr. Gilbert: Plaintiff is, your Honor.

* Page numbering stamped at top of page of original Reporter's Transcript.

The Court: Show the appearance of Mr. Taylor for Mr. Jones and Mr. McNabb for Mrs. Kelly. Put the names of the jurors in the box and draw a jury.

The Clerk: Box is full, your Honor.

The Court: Very well.

(At this time, Mr. Gilbert made a statement to the jury.)

(Mr. Gilbert and attorneys for the defendants proceeded at this time to impanel a jury.)

(A jury was duly empaneled and sworn.)

The Court: Swear the jurors in the box Proceed with your opening statements.

(Whereupon, Mr. Gilbert made his opening statement to the jury.)

(Mr. Taylor made an opening statement to the jury.)

The Court: In a moment, we will take a recess until three o'clock. That's one hour later than usual. We will take a recess until three.

The Clerk: Court is recessed until three o'clock.

(At 11:52 a.m., the trial of this cause [3] was recessed until 3 p.m.)

(At 3 o'clock p.m., April 23, 1951, the trial of this cause was resumed.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. McNabb: Ready, your Honor.

Mr. Gilbert: Ready, your Honor.

The Court: Very well.

Mr. Gilbert: May it please your Honor——

The Court: Mr. Gilbert.

Mr. Gilbert: I ask the court to take judicial notice that the United States of America has been the sovereign over the Territory of Alaska for more than 50 years last past and as such has made grants of land to citizens during that period, that it owns all lands in the Territory except that which has been conveyed under the laws of the United States.

The Court: Very well, the court will take judicial notice of that.

Mr. Gilbert: Mark this for identification. [4]

The Clerk: Plaintiff's identification number one.

(At this time, a photostatic copy of Executive Order Number 8020 was marked and identified as Plaintiff's Identification 1.)

Mr. Gilbert: May it please your Honor, the plaintiff offers in evidence as its exhibit "A," executive—a copy of executive order number 8020 which has been duly authenticated by the National Archives.

(Document handed to Mr. McNabb.)

Mr. McNabb: Your Honor, I object to the ad-

mission of that instrument at this time. There's no showing that it is material or relevant or has any bearing on the outcome of this case.

The Court: Objection overruled. May be admitted.

The Clerk: Plaintiff's exhibit "A."

(At this time, Plaintiff's Identification 1 was received into evidence and marked as Plaintiff's Exhibit "A.")

Mr. Gilbert: With the permission of the court, I will read this executive order.

The Court: Very well.

(Whereupon, Mr. Gilbert read the [5] exhibit to the jury.)

(Plaintiff's Exhibit "A" is as follows):

"38-3646

"Executive Order

"Withdrawal of Public Land in Aid of

"Flood Control

"Alaska

"By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497, and subject to the conditions therein expressed, it is ordered that all public lands in the following-described areas in Alaska be, and they are hereby, temporarily withdrawn from settlement, location, sale, or entry, for flood-control purposes in connection with the Tanana River and Chena Slough flood-control pro-

ject under the supervision of the War Department as authorized by the act of June 28, 1938, 52, Stat. 1215:

“Fairbanks Meridian

“T. 2 S., R. 2 E., secs. 22 to 27, inclusive, 35 and 36,

“T. 3 S., R. 2 E., those parts of secs. 1, 2 and 12 east of Tanana River,

“T. 2 S., R. E., secs. 19 and 28 to 34, inclusive (unsurveyed),

“T. 3 S., R. 3 E., all east of Tanana River [6] (partly unsurveyed),

“T. 4 S., R. 3 E., secs. 1, 12 and 13,

“T. 3 S., R. 4 E., secs. 6, 7, 18, 19, 30 and 31 (unsurveyed),

“T. 4 S., R. 4 E., secs. 6, 7, 18 and 19, containing approximately 24,503.53 acres.

“This order shall continue in force until revoked by the President or by an act of Congress.

“/s/ FRANKLIN D. ROOSEVELT.

“The White House, December 2, 1938.

The National Archives
Filed and Made Available
for Public Inspection
Dec. 3, 11:32 A.M., '38,
In the Division of the
Federal Register.

“8020.”

Mr. Gilbert: May it please your Honor, at this time we would like to call Mr. Fred Weiler.

Mr. Hepp: Your Honor, we are informed that for about 5 minutes it would be very, very inconvenient for this witness to come. I wonder if we could ask for a 5 minute recess.

The Court: Take a recess until quarter [7] past three.

(At this time, a short recess was taken.)

The Court: Counsel stipulate all members of the jury are present?

Mr. McNabb: We will, your Honor.

Mr. Taylor: Yes, your Honor.

The Court: Very well. Ready to proceed?

Mr. McNabb: Yes, your Honor.

Mr. Gilbert: Ready. At this time, we would like to call Mr. Fred Weiler.

FRED J. WEILER

called as a witness in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gilbert:

Q. State your full name for the court please.

A. Fred J. Weiler.

Q. By whom are you employed, Mr. Weiler?

A. Bureau of Land Management, Department of Interior.

Q. And where are you stationed?

A. Fairbanks.

Q. What is the title of your position?

A. Manager, land office.

(Testimony of Fred J. Weiler.)

Q. Is that the Fairbanks land office? [8]

A. Yes.

Q. What are your duties as manager of the land office?

A. Well, the bureau is charged with the administration of the disposal of public lands and my particular duties are to oversee the office and to pass judgment on claims which are presented to us, to maintain the official records of land status, to receive and account for monies paid and received in payment for those lands.

Q. Do you know the defendants in this action, Nell Kelly and Thomas Jones?

A. I am acquainted with Mrs. Kelly. I don't know Mr. Jones.

Q. In your office, have you had any business dealings with Mrs. Nell Kelly? A. Yes.

Q. Tell the court the nature of those business dealings.

A. Well, it has been a considerable amount of business as I recall without consulting my records. Mrs. Kelly has been in on occasion for timber permits for instance. She has presently an application on file—an application for a tract of land located down the Alaska Highway and she also has on file an application for a tract of land located out the Richardson Highway, about 20 Mile, 22 Mile.

Q. Do you know if—what sort of a filing has Mrs. Kelly at about 22 Mile?

Mr. Taylor: If the Court please, the [9] filing

(Testimony of Fred J. Weiler.)

would be the best evidence. We object to the question.

The Court: Objection sustained.

Q. (By Mr. Gilbert): Are you familiar with the property known as Moose Creek lodge?

A. Yes, I have driven past it and seen it. I have been in it once or twice.

Q. Do you know who claims ownership of Moose Creek Lodge? A. Yes. Mrs. Kelly.

Q. Mrs. Nell Kelly? Do you know who occupies it now? A. I do not.

Q. Mr. Weiler, any record that you might have of Mrs. Kelly's filing down about 22 Mile, would it be available? A. For what purpose?

Q. For the court. A. Yes.

Q. How long would it take you to get that record for the court?

A. Well, there's—as I stated before, there would be a considerable amount of filing and (interrupted).

Q. Just pertaining to Mile 22?

A. Just as long as it takes me to walk up stairs. I'm sorry, may I amend that? It depends on what records you want, tract books, plats, case files (interrupted).

Q. The filing that Mrs. Kelly has made at 22 Mile. [10] A. A minute.

Mr. Hepp: (To witness.) One minute?

Mr. Gilbert: May it please your Honor, I ask leave of the court for this witness to run upstairs and get the records of that filing.

(Testimony of Fred J. Weiler.)

The Court: How long do you think it will take you?

The Witness: Just to walk upstairs and pick them up and bring them back down.

The Court: Go ahead.

(The witness left the witness stand and left the courtroom.)

(The witness entered the courtroom and resumed the witness stand.)

Q. (By Mr. Gilbert): Do your records show the history of this application, Mr. Weiler?

A. Yes.

Q. When was it first filed?

A. First document I have on this particular case here is filed March 29, 1948.

Q. What is that document?

A. It was an application to contest filed by one Robert H. Casperson.

Q. Now, is that contest by Nell Kelly or someone contesting (interrupted).

A. Someone contesting her claim to a tract of land located out on the Richardson Highway.

Q. What was the tract of land?

A. Described as the unsurveyed southwest quarter, section 27, township 2 south, range 3 east, of the Fairbanks meridian as recorded on page 552, volume 22, as instrument number 87034 in the record of the United States Commissioner and Records Office.

(Testimony of Fred J. Weiler.)

Q. When did Nell Kelly make the original filing on that piece of land?

A. May I make a little explanation?

Q. Yes.

A. The lands in question are unsurveyed and my office until very recently had no record of notices of claim filed for such lands. Such claims were initiated by actual settlement on the ground and notice of that settlement was recorded in the United States Commissioner's office. It was not until the applicant or settler actually applied for patent of the ground that I would have any official record of it and that might be 5 years, 10 years or 50 years in some cases.

Q. Do you know how long Nell Kelly by her own statements has claimed that piece of land?

A. During the winter of 1943.

Q. You mean she claimed—that's when she entered on this ground? [12]

A. Shall I read the statement?

Q. Yes.

A. During the winter of 1943, she erected a dwelling 30 by 20 feet and later made an addition to the said building.

The Court: Read a little slower please.

The Witness: I'm sorry. That was the statement I was referring to.

Q. (By Mr. Gilbert): Do you know if that has any relation to the property presently known as Moose Creek Lodge?

A. The case is in reference to the land on which Moose Creek Lodge is located.

(Testimony of Fred J. Weiler.)

Q. What is the number of the section immediately south of section 27 to which you have referred?

Mr. McNabb: I object to that. There's been no showing that there is any relationship between the two pieces of property, not material to the issues.

The Court: Objection overruled.

The Witness: I have to count up (interrupted).

The Court: Don't you have a map you can look at?

The Witness: Not right handy. It would be—section 34 would be immediately to the south of section 27.

Mr. Gilbert: I request this be marked [13] as plaintiff's identification.

The Clerk: Plaintiff's identification number two.

(At this time, a plat was marked for identification as Plaintiff's Identification Number 2.)

Q. (By Mr. Gilbert): Mr. Weiler, I hand you this plat which is marked as plaintiff's identification number 2 and ask you to tell the court what it is.

A. It is a diagram showing section 34, township 2 south, range 3 east of the Fairbanks meridian.

Q. And what is the section immediately north of that? A. Section 27.

Q. Is that the section 27 to which you have referred? A. It is.

Q. Does that map or plat or diagram show the location of Moose Creek Lodge? A. Yes.

Q. By whom was the plat made or complied?

(Testimony of Fred J. Weiler.)

A. By our division of engineering of the Bureau of Land Management.

Mr. McNabb: I object to that question and move the answer be stricken, your Honor.

The Court: Objection overruled. Motion [14] denied.

Q. (By Mr. Gilbert): What are the duties of the Division of Engineering, Bureau of Land Management? A. Surveying.

Q. What type of surveying?

A. Cadastral surveying, land surveying that is, in rectangular survey system as used by the government.

Q. Will you state if you know who if anyone has authenticated that for the Division of Engineering?

A. Lyle F. Jones, Office Cadastral Engineer.

Q. Does his signature appear thereon?

A. It does.

Q. Have you ever seen the signature of Lyle F. Jones before? A. Yes, many times.

Q. Are you familiar with his signature?

A. I am.

Q. And that is his signature, you have stated, that appears on that plat?

A. To the best of my knowledge.

Q. Immediately above his signature, what writings appear thereon? A. Shall I read it?

Q. Yes.

A. This plat has been compiled by the Division of Engineering, Bureau of Land Management, at

(Testimony of Fred J. Weiler.)

Juneau, Alaska, from [15] information contained in our files and shows the location of the Moose Creek Lodge development as related to the preliminary field survey of section 34, township 2 south, range 3 east, Fairbanks meridian as executed in October, 1949, by cadastral engineer Lloyd Toland, of the Division of Engineering, Bureau of Land Management. Signed Lyle F. Jones, office cadastral engineer, February 6, 1951.

Q. And you have stated that Moose Creek Lodge appears thereon? A. It does.

Mr. Gilbert: May it please your Honor, at this time I offer in evidence this plat which has been testified to by this witness. It is plaintiff's identification number two.

(Document shown to Mr. McNabb.)

Mr. McNabb: Your Honor, I will object to this as being a sketch, not as a survey; that it isn't an original nor has it been certified to be true and correct, nor is there any showing as to the notes on the actual survey which was made, if one was made. This does not in itself represent to be the survey of any section. It states in the statement which appears on this document that it was made from information contained in the files of the office of the cadastral engineer and not notes which were prepared by the person who made the survey and at the time that the survey [16] was made. The map itself was prepared on the 6th day of February,

(Testimony of Fred J. Weiler.)

1951, which I believe, your Honor, was subsequent to the filing of the complaint in this action.

(Document was handed to the court.)

Mr. Gilbert: May it please your Honor, I would like to come forward with an offer of proof.

The Court: You have authorities, do you, to submit?

Mr. Gilbert: Yes, your Honor.

The Court: I will excuse the jury from the courtroom. Remain in the hall until called to return.

(At this time, the jury left the court.)

(Mr. Gilbert made a statement to the court.)

(Mr. McNabb made a statement to the court.)

(Mr. Gilbert further argued to the court.)

The Court: Well, of course the authority you read referred to an official survey. Well, that would mean a survey in connection with sectionizing the country. It wouldn't be a map that was made for just one law suit. This certificate of Mr. Jones appears to be an original certificate as far as that goes and in two places he has written on it, so I think it is an original as far as that goes even if it was a copy in the first place. Even if the map part was [17] a copy in the first place, the certificate is nevertheless original, but I don't consider this in the line of an official survey. This is merely a private survey of the government for the purposes of this particular suit. I think under those con-

(Testimony of Fred J. Weiler.)

ditions it has to be proved just the same as anyone else has to prove a map in court, by bringing in the surveyors and show the field notes they took and that they then made a map pursuant to those field notes. That being the case, I'll sustain the objection.

Mr. Gilbert: May it please your Honor, we have information that this surveyor was on loan to Alaska from in the States. We therefore ask leave of the court for a continuance to get him up from someplace in the States either from Idaho or one of the other western states where he is stationed.

The Court: Very well.

Mr. Gilbert: I would like to explain to the Court this is a section as we understand it—the township is not completed yet and there will be a township map whenever the survey of the entire township is completed.

Mr. McNabb: Your Honor, I feel obliged at this time to resist the motion for a continuance unless it can be shown that the surveyor can produce within—be produced here within a few days. My client, Mrs. Kelly, lives some 500 miles down the highway and has come in here [18] at an expense to herself and she cannot maintain herself in Fairbanks for any length of time.

The Court: Well, I'll have to set it for next fall. The next jury case will be October or November.

Mr. Gilbert: May I have until tomorrow morning then? I could know how soon I could get this surveyor in here or prove it otherwise.

(Testimony of Fred J. Weiler.)

The Court: Well, I will grant until tomorrow morning then, ten o'clock. Call the jury.

(The jury returned into the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. McNabb: Yes, your Honor.

Mr. Gilbert: Yes, your Honor.

(The Court duly admonished the jury and at 3:50 p.m. o'clock, the trial of this cause was adjourned until April 24, 1951 at ten o'clock a.m.)

Be It Remembered, that upon the 24th day of April, 1951, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, plaintiff and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court [19] proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: What is the status of the case?

Mr. Hepp: Your Honor, we've got an office full of engineers and surveyors down the other end of the hall. I have talked with Mr. Taylor and Mr. McNabb. We would like leave of this Court to go down—that is—discuss this matter with Mr. Taylor and Mr. McNabb and I think half an hour would do it. If the Court would give us that, we may

possibly avoid a considerable amount of time in so doing. We are ready to go. We just had these engineers come in and we would like to discuss this with Mr. McNabb and Mr. Taylor.

The Court: And you think—— (interrupted).

Mr. Hepp: I believe half an hour possibly will do it. Mr. Taylor states that he is willing to go down and listen to what we have to offer. It would be very tedious to bring it out into Court. I feel convinced of it, your Honor. I might state to the Court that the surveyor of this other plat is in the states. We are unable to produce him at this time.

The Court: Well, I think we better give you a little more time. It always flies when you're talking about a subject. I think a quarter to eleven you would be [20] ready, or about that time?

Mr. Hepp: We are hopeful we can come to an agreement by that time.

The Court: Very well. The jury will be in recess until a quarter to eleven. The jury is excused until a quarter to eleven.

(At this time, a recess was taken.)

(At 11:00 o'clock a.m., the trial of this cause was resumed.)

The Court: We are going to take a recess in a few seconds until two o'clock this afternoon. Upon taking that recess, the jurors not engaged in the trial of this case will be excused until tomorrow morning at ten o'clock. The jurors engaged in the trial of this case will be excused until two

this afternoon. We will take the adjournment then.

The Clerk: Court is recessed until two o'clock.

(At 11:02 o'clock a.m., the trial of this cause was recessed until 2:00 o'clock p.m.)

(At 2:00 o'clock p.m., the trial of this cause was resumed.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, [21] your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Hepp: Government's ready.

Mr. McNabb: Ready, your Honor.

The Court: Very well.

Mr. Hepp: Your Honor, the attorneys in this matter have been arguing back and forth concerning this location of Moose Creek Lodge and the evidence that is going to be necessary to show that, and we have been running periodically hot and cold and it seems to be cold now. I see no—I have no choice, your Honor, but to send a chainman out. That's going to take probably 6 hours to run from a designated point and I ask leave of the Court for some time—this has been an unexpected event. We thought that we had it made there for a while but we just can't come to an agreement, your Honor, and I might suggest to the Court that there's another case which the government is ready to present if your Honor will see fit to entertain

a motion to adjourn this cause until the other one can be heard and by that time, I am certain that the evidence will be in a proper form to offer to the Court.

The Court: When would you like to have this case continued? For a couple of days, until day after tomorrow? [22]

Mr. Hepp: Well, we have a reasonable expectation of concluding the case of *United States vs. Belcher*—that's the next case on the court's calendar—in one day. There is some small chance that it would run into a portion of the following day. If we could conclude it in one day, why I would ask for a continuance through tomorrow to go through the morning of the next day. Mr. Taylor is incidentally the attorney in the case that is set to follow.

The Court: Yes. The unfortunate thing is that I can't get the rest of the jury until tomorrow to start the *Belcher* case so I have to postpone this case. If you think you can be ready day after tomorrow, we can start the *Belcher* case tomorrow.

Mr. Hepp: I am confident we will be able to proceed day after tomorrow, your Honor.

The Court: Very well. Is that satisfactory to you, Mr. Taylor?

Mr. Taylor: That's satisfactory.

The Court: Very well. In a moment, we will recess this case until day after tomorrow. You will have to appear as prospective jurors in the case of *United States vs. Belcher*. Now, do you get that straight? You will have to appear tomorrow for this *Belcher* case and day after tomorrow you will take

this case up again. We will recess and I would like to see Mr. Green a moment after the recess. [23] The court will then be in recess until tomorrow at ten o'clock.

(At 2:05 o'clock p.m., the trial of this cause was recessed to follow the case of United States vs. Belcher.)

Be It Remembered, that upon the 27th day of April, 1951, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, the Honorable Harry E. Pratt, District Judge, presiding.

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: Any ex parte matters? Counsel ready to proceed with the trial of this case?

Mr. Gilbert: Yes, your Honor.

(At this time, Mr. Taylor and Mr. McNabb had discussion with the court under ex parte matters.)

The Court: Call your witness.

Mr. Gilbert: If it please your Honor, I believe at this time Mr. Weiler is still on the stand.

The Court: Yes.

FRED J. WEILER

having been previously [24] sworn, resumed the witness stand and testified as follows on direct examination:

Q. (By Mr. Gilbert): Mr. Weiler, to refresh our memories, I will ask you a few questions again. By whom are you employed?

A. Department of Interior, Bureau of Land Management.

Q. And what is the title of your office?

A. Manager, land office.

Q. What are your duties?

A. Maintain the records of the land office and maintain status of public lands, to accept and administer applications received, to receive and account for monies paid in rentals, royalties or fees for the public lands.

Q. Mr. Weiler, are you acquainted with your official records insofar as they pertain to the general area of about Mile 22 on the Richardson Highway from Fairbanks?

A. I am.

Q. Are you also acquainted with the property known as Moose Creek Lodge?

A. Yes.

Q. Is it in that general location?

Mr. McNabb: I object, your Honor, to any questions concerning any of the records. The records themselves are the best evidence.

The Court: There is no question about [25] records at this time, only whether he was acquainted with Moose Creek Lodge.

Mr. McNabb: I think he is trying to tie that up,

(Testimony of Fred J. Weiler.)

your Honor, and so the only method that this witness will have of knowing of the general location would be the location in reference to any records which he may have in the land office.

The Court: Objection overruled.

The Witness: Will you repeat the question please?

Mr. Gilbert: The reporter will read the question.

(The question was read to the witness by the reporter as follows:

Q. Is it in that general location?

The Witness: Yes.

Mr. Gilbert: I ask that this be marked government's identification number 3.

(At this time, a map of the Fairbanks Meridian, township 3 south, range 3 east was offered and marked as government's identification number 3.)

Q. (By Mr. Gilbert): Mr. Weiler, I hand you government's identification 3 and ask you to tell the court what it is.

A. It's the official plat of survey of township 3 south, range 3 east, Fairbanks Meridian. [26]

Q. Have you ever seen this plat or map before?

A. Yes.

Q. Where have you seen it before?

A. In my office. It's one of the permanent records of the land office.

Q. Does this plat bear the approval of any agency of the Federal Government?

(Testimony of Fred J. Weiler.)

Mr. McNabb: Your Honor, I object to that question. Approval of that map is no part of the issues of this case. There is proper method set out in the law for the verification of maps and records and whether it has been approved by any agency or any person has no bearing on the issues or admissibility of that map.

The Court: Objection overruled.

The Witness: Yes.

Q. (By Mr. Gilbert): By whom has the map been approved?

Mr. McNabb: Same objection, your Honor.

The Court: Same ruling.

The Witness: By the United States Supervisor of Surveys and by the Assistant Commissioner of the General Land Office, Department of the Interior.

Q. (By Mr. Gilbert): And you have stated that it is on file in your office as an official record, is that correct? [27]

A. That's correct.

Mr. Gilbert: May it please your Honor, I offer in evidence as plaintiff's exhibit this official map.

(Document shown to Mr. McNabb.)

Mr. McNabb: Your Honor, I am objecting to this map on the grounds that it is not an original. There is no showing where the original is or why it has not been produced. There is no one—this witness is not competent to testify as to the truthfulness or correctness of this instrument which is in itself a copy and on the further grounds that title 28,

(Testimony of Fred J. Weiler.)

section 672 of the Judicial Code states that copies of any records in the Bureau of Land Management authenticated by the seal and certified by the director thereof or when his office is vacated and so on, shall be admissible. Now, this instrument has not been certified by the Commissioner. It has been certified but this is a copy of a certificate. There is no seal on this instrument and I believe that it is therefore invalid. This instrument in itself is not an original and does not purport to be an original. As I say, there's no showing of the seal and section 34 is not set out, section 34 being the land which is the subject of this litigation. Section 34 is not shown in its entirety on this map and therefore the instrument is inadmissible.

The Court: What was your citation again?

Mr. McNabb: Title 28, section 672, [28] your Honor. A further ground that this witness is not competent to testify as to this instrument.

The Court: All right, may I see the proffered exhibit?

(Document handed to the Court.)

Mr. McNabb: I object to it further, your Honor, on the grounds it does not show the flood control area which is the subject of this litigation. Your Honor, I will also cite Wigmore, section 1680 for the court's consideration in this matter.

Mr. Gilbert: I offer to come forward with proof.

The Court: The section in the statute you read is where copies are used instead of originals. These

(Testimony of Fred J. Weiler.)

are originals. Objection overruled, may be admitted.

Mr. McNabb: I will except to that, your Honor.

The Clerk: Plaintiff's Exhibit "B."

(At this time, Plaintiff's Identification Number 3 was introduced into evidence and marked as Plaintiff's Exhibit "B.")

Q. (By Mr. Gilbert): Mr. Weiler, showing you Plaintiff's Exhibit "B," I ask you from this plat of what area are these surveys? [29]

Mr. McNabb: The map itself is the best evidence to that, your Honor. I'll object to that question.

The Court: Why isn't that a good objection?

Mr. Gilbert: May it please your Honor, I was asking the witness to read from the plat itself.

Mr. McNabb: Well (interrupted).

The Court: You can read anything and show it to the jury yourself.

Mr. Gilbert: From plaintiff's exhibit, if it please the Court, it is entitled township number 3 south, range number 3 east, of the Fairbanks Meridian, Alaska.

Q. (By Mr. Gilbert): Now, Mr. Weiler, I will ask you to look at plaintiff's exhibit and ask you from your knowledge of the public land survey system in connection with section 34, township 2 south, range 3 east, to tell the Court what section corners on this exhibit would be closest to the area I have mentioned?

Mr. McNabb: I object to that question, your

(Testimony of Fred J. Weiler.)

Honor, as not being within the issues of this case. The map itself is the best evidence and further for the ground that the question as framed is impossible to answer.

The Court: Objection overruled.

Mr. McNabb: It has no bearing on the [30] issues of this case.

The Witness: The corners closest to section 34, township 2 south, range 3 east on this plat would be the corner common to section 10, 11, 14 and 15; the corner common to section 9, 10, 15 and 16; the corner common to sections 3, 4, 9 and 10 and the corner common to section 4, 5, 8 and 9.

Q. (By Mr. Gilbert): Mr. Weiler, to make it a little clearer for the jury, could you tell us from the surveyed sections which direction—which corner of those surveyed sections would be closest?

Mr. McNabb: I object to that question as the map is the best evidence, your Honor.

The Court: Objection overruled.

The Witness: I don't quite understand your question.

Q. (By Mr. Gilbert): For example, I note on this map that a section 22 has been surveyed. Would the area I have mentioned be closest to the southeast corner of section 22?

Mr. McNabb: What area has he mentioned?

Mr. Gilbert: That's—may it please the Court, would you like me to repeat that?

The Witness: No, I understand (interrupted).

(Testimony of Fred J. Weiler.)

The Court: Which area are you speaking of?

Mr. Gilbert: I am speaking of section 34 of township 2 south, range 3 east.

The Witness: The corner closest (interrupted).

Mr. McNabb: I object to that as the map is the best evidence, your Honor.

The Court: Overruled.

The Witness: The corner closest to section 34, township 2 south, range 3 east would be the northeast corner of section 15, the northeast quarter—northeast corner of section 15, the northeast—the northwest and also southeast corner of section 9. That would be the same point. The northeast corner of section 9, the northeast corner of section 5 and the southeast corner of section 5 and northwest quarter of section 9, which would be the same point.

Mr. McNabb: I move that answer be stricken, your Honor, on the grounds that it has no connection, no bearing, on the issues of this case.

The Court: Motion denied.

Mr. Gilbert: No further questions.

Mr. McNabb: No questions.

(At this time, Mr. Fred J. Weiler left the witness stand.)

Mr. Gilbert: May it please the court, at this time, I call Bob Lyle. [32]

ROBERT E. LYLE

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gilbert:

Q. State your name for the Court please?

A. Robert Lyle.

Q. What is your occupation, Mr. Lyle?

A. Civil engineer.

Q. Now, what does the field of civil engineering include or allow (interrupted).

The Court: Make it a direct question. This is a preliminary question. You don't have to be so careful about not making it leading.

Q. (By Mr. Gilbert): You stated you're a civil engineer. What branches of civil engineering have you specialized in, if any?

A. Land surveying, structural building, general construction.

Q. When did you receive your professional education as a civil engineer?

A. Between 1927 and 1932.

Q. Where did you receive that professional education? A. At the University of Alaska.

Q. How long have you been engaged in this type of work?

A. Since my graduation in 1932. [33]

Q. By whom are you now employed?

A. Corps of Engineers.

Q. Where are you stationed?

A. At Ladd Field.

(Testimony of Robert E. Lyle.)

Q. Did you receive a call from the office of the United States Attorney, Fairbanks, Alaska on or about the 24th of April, 1951, requesting you to make a survey of the premises of Moose Creek Lodge showing its location according to meridian, township, range and section? A. Yes.

Q. Did you thereafter visit the Moose Creek Lodge—the locality of Moose Creek Lodge?

A. I did.

Q. And did you make certain measurements and observations in this area? A. Yes.

Q. What was used as a starting point in making these measurements and observations?

A. The northeast corner of section 9, township 3 south, range 3 east.

Q. I hand you Plaintiff's Exhibit "B" and ask you if you can locate that starting point on this map or plat?

A. Yes—how can I answer that sitting on the stand? It is indicated as a point on this plat.

Q. Now, did you find the corresponding point on the ground? [34] A. Yes, I did.

Q. And you stated that you started from that point? A. That's right.

The Court: What point was that?

Mr. Gilbert: The northeast.

The Court: What point?

The Witness: The northeast, your Honor of section 9.

The Court: Same township and range you mentioned before?

(Testimony of Robert E. Lyle.)

The Witness: Yeah, township 3 south, range 3 east.

Q. (By Mr. Gilbert): When did you make this visit?

A. I made the first visit the night before last in the evening and did the actual work yesterday.

Q. Based upon those measurements and observations, did you make a survey of Moose Creek Lodge?

Mr. McNabb: I object to that, your honor, on the grounds that no proper foundation has been laid for it and I request permission of the Court to ask a few additional questions—foundation questions.

Mr. Gilbert: I can re-state the question.

The Court: Very well, re-state it. [35]

Q. (By Mr. Gilbert): Where did you measure to and of what did you make a survey?

A. I measured (interrupted).

Mr. McNabb: I object to that question, your Honor, on the ground no foundation has been laid for it. He hasn't shown what he used or how he used it to know that he was at that particular point to which he states he started his survey.

The Court: Just tell what you did to make a survey of Moose Creek Lodge.

The Witness: I started at the northeast corner of section 9.

Mr. McNabb: And I want to know, your Honor, how he found that corner.

The Court: All right, tell how you found that.

The Witness: I found a brushed line directly

(Testimony of Robert E. Lyle.)

opposite Moose Creek Lodge and followed that line out for 2 miles and found the iron marker which is marked properly for the northeast corner of section 9.

Mr. McNabb: May I ask some questions, your Honor?

The Court: I think Mr. Gilbert can do—ask him at present. You can cross-examine later. [36]

Q. (By Mr. Gilbert): What was recorded on this iron marker?

A. May I refer to my note book on that?

The Court: Yes.

The Witness: The corner is a two-inch iron post approximately 8 inches above ground with a brass capping marked—it's a general land office marker—stamped township 3 south, range 3 east, section 4, section 3, section 9, section 10 and dated 1934.

Q. (By Mr. Gilbert): And from that corner or monument, you started? A. That's right.

Q. What did you do then after you found that corner?

A. Well, we had to (interrupted).

Mr. McNabb: I object to that on the grounds that there hasn't been any proper foundation laid.

The Court: Objection overruled.

The Witness: We had to locate a second point to determine our meridian and we proceeded a half mile south of this corner and found a quarter corner common to sections 9 and 10.

Q. (By Mr. Gilbert): I will hand you again

(Testimony of Robert E. Lyle.)

Plaintiff's Exhibit "B" and ask if you can point out that second location that you found.

A. The second location is in the intersection of this [37] quarter section line and the section line—intersection of the quarter intersection line on the east boundary of section 9.

Q. What did you do after that?

A. Well, we ran a traverse from starting at this northeast corner of section 9, ran over to the highway and up the highway to a monument (interrupted).

The Court: Just a minute.

The Witness: Beg pardon?

The Court: Start that over again.

The Witness: I will start back at the beginning. We started it at the northeast corner of section 9, ran a traverse out to the Richardson Highway and up the highway to a point which I knew to be approximately on a point which we were seeking and then by computation determined the exact point on the ground.

Mr. McNabb: I object to that and move the answer be stricken on the grounds that the answer has no bearing on the issues of this case, no proper foundation laid and it is stated he ran to a place which was approximate to something.

The Court: Motion denied.

Q. (By Mr. Gilbert): Who was with you when this work was being done?

Mr. McNabb: I object to that as not [38]

(Testimony of Robert E. Lyle.)

within the issues of the case and has no bearing on the case.

The Court: Overruled.

The Witness: Well, we had a kind of a large crew.

Mr. McNabb: I object to that. He can answer from his own memory.

The Court: Qualify the use of a memorandum, Mr. Gilbert.

Q. (By Mr. Gilbert): At the time you made these measurements and observations, did you note who the other members of your party were?

A. Yes, I did.

Q. Will you refer to those notes and tell us who the members of the party are?

Mr. McNabb: I object to that as there's no proper foundation laid. He didn't say he wrote them down.

The Court: Yes. Did you write them down at the time and put the names down?

The Witness: Yes.

The Court: Do you have your writing in your hand?

The Witness: Yes, I have.

The Court: All right, go ahead and answer it.

The Witness: M. Stutzman, R. Angstman, [39] J. Coughlin, L. Dewey, W. L. McPeak, T. Hazard, T. Reinilla, A. Rumsteter, C. Nielson, G. Hinch, J. Finnagan and R. Cummins.

Q. (By Mr. Gilbert): And you were the surveyor in charge of this party?

(Testimony of Robert E. Lyle.)

A. That's right.

Mr. McNabb: I move that all of those names be stricken from the record and have no bearing on this case, no part of the issues.

The Court: Motion denied.

Q. (By Mr. Gilbert): Now, Mr. Lyle, you stated that you ran a line up the Richardson Highway, is that correct? A That's correct.

Q. Did you locate any points on up there?

Mr. McNabb: I object to that question. There's no proper foundation laid, no showing it is relevant to the issues of this case; not shown it's material.

The Court: Objection overruled.

Mr. McNabb: Has no bearing on the issues.

The Witness: Yes. I used as a point a monument which had been established there by the Bureau of Land Management which—would you like me to draw it?

Mr. McNabb: I object to that as calling for a conclusion. [40]

The Court: Yes, draw it. Objection overruled.

The Witness: One of the points which I used (interrupted).

Mr. McNabb: I object to any testimony from those records.

The Court: Did you make records at the time of your actions in making that survey?

The Witness: Yes, I did.

The Court: You wrote them in that book?

The Witness: Yes, I did.

(Testimony of Robert E. Lyle.)

The Court: And it's all in your own handwriting?

The Witness: That's right.

The Court: And you wrote it at the time you made the survey?

The Witness: That's correct.

The Court: All the writings in that book are correct, are they?

The Witness: Yes, they are.

The Court: Objection overruled. Go ahead.

The Witness: This metal is a 3-inch galvanized iron pipe with a brass capping (interrupted).

Mr. McNabb: I object to this, your [41] Honor; no showing that this metal he's talking about has any bearing on the issues of this case.

The Court: Objection overruled.

The Witness: And it's marked witness corner, township 2 south, range 3 east, section 28, section 27, section 33, section 34 and dated 1949.

Q. (By Mr. Gilbert): As a result—after you had located this point, what did you do after that?

A. Then I had a definite position of this point in relation to the northeast corner of section 9 and then was able to determine the true position of the northwest corner of section 34.

Mr. McNabb: I object to that as calling for a conclusion, your Honor, no proper foundation has been laid for that question, no showing it is material to the issues involved.

The Court: Objection overruled.

Mr. McNabb: Not competent.

(Testimony of Robert E. Lyle.)

Q. (By Mr. Gilbert): After you located the northwest corner of section 34, what did you do?

A. I then located Moose Creek Lodge in relation to this northwest corner of section 34.

Q. Were you able to ascertain the distance of Moose Creek [42] Lodge—just a minute. I withdraw that. Where was Moose Creek Lodge?

Mr. McNabb: Now, I object to that as there's no proper foundation laid; no showing as to the—as to what he did, where he began, how he arrived at the particular location, an opinion; and on the grounds that the witness is not competent to testify. There has been no proper foundation laid.

The Court: Objection overruled.

The Witness: I forgot the question now.

Mr. Gilbert: Repeat the question.

(The question was read to the witness as follows by the reporter.)

Q. Were you able to ascertain the distance of Moose Creek Lodge—just a minute. I withdraw that. Where was Moose Creek Lodge?

The Witness: Moose Creek Lodge is located southeast of this corner. I have the exact distances on a map which I have with me.

Q. (By Mr. Gilbert): Oh, then you reduced all of these measurements and observations to writing at that time, did you? A. Yes, I did.

Q. Was that done from your notes?

A. Yes, it was.

Q. Do you have that map with you at this [43] time? A. Yes.

(Testimony of Robert E. Lyle.)

A. Yes.

Mr. Gilbert: Mark this as plaintiff's identification.

Clerk of the Court: Plaintiff's identification number four.

(At this time, a map was offered and marked as Plaintiff's Identification Number 4.)

Q. (By Mr. Gilbert): I hand you plaintiff's identification number 4 and ask you if this is—
(interrupted).

The Court: Wouldn't it be better to put that up on the board right now?

(At this time, the map was placed on a board in front of the jury.)

Q. (By Mr. Gilbert): Is plaintiff's identification 4 the map that you brought with you?

A. Yes.

Q. Now, will you show the court and the jury by pointing out on this map where you started and the final location by you of Moose Creek Lodge?

Mr. McNabb: I object to that question, your Honor, as no proper foundation has been laid for any testimony concerning this map.

The Court: Objection overruled. [44]

The Witness: I started at the northeast corner of section 9 which was at this point on the map (pointing), proceeded up the section line to a point which I called H-1; then northeasterly to a point which I call H-2 and again northeasterly to a point

(Testimony of Robert E. Lyle.)

on the Richardson Highway which I called H-3 and then up the highway to a point I called H-4; and then to the witness corner which I discussed previously. Then by computation, I was able to determine the relation of this witness corner to the northeasterly corner of section 9 and then to determine the relation of the witness corner to the northwest corner of section 34 and then on this other smaller—larger scale—reproduction—we have yet another point which I called H-6 between H-4 and H-3 and then set another additional point H-7 over close to the Moose Creek Lodge and then from H-7 determined the position of 3 corners of Moose Creek Lodge. Then by computation I determined that the northwest corner of Moose Creek Lodge lies—— (interrupted).

Mr. McNabb: I object to any further testimony on that score, your Honor, until such time as this witness shows us how he arrived at this particular computation. He stated that he points and then he makes computations. No proper foundation laid for any further testimony.

The Court: Very well. You can state what your method was of computation.

The Witness: Well, I would be glad to go [45] into it in great detail if you wish—unlimited detail.

Mr. Gilbert: If the court wishes, I believe we can go through his notes and give the coordinates in each and every case.

The Witness: Precisely what I did was compute the coordinates of each of these points. I

(Testimony of Robert E. Lyle.)

started and assigned a coordinate value at the north-easterly corner of section 9 of 10,000 north and 10,000 east and then I computed the coordinates of the northwest corner of the Moose Creek Lodge and then I arrived at a distance south from the section line of 1181.70 feet. That is from the northwest corner of Moose Creek Lodge to the north boundary of section 34, a distance of 812.86 feet from the northwest corner of Moose Creek Lodge to the west boundary of section 34.

Mr. McNabb: I object to the statement of figures and move they be stricken until such time that he can testify how he arrived at those particular figures.

The Court: Objection overruled.

Q. (By Mr. Gilbert): Are you testifying from the figures on the map?

A. Yes, I am. I wrote them on there from my calculation sheets. I have my calculation sheets here if you wish me to read the whole thing.

Mr. McNabb: Did you make those figures at the same time? [46]

Mr. Gilbert: I object, your Honor.

Mr. McNabb: Well, there hasn't been any proper foundation laid, your Honor, for his testimony as to what's on that map.

The Court: Very well, then. Your objection is overruled. Proceed.

The Witness: To whose question?

The Court: Mr. McNabb's question—objection is overruled. Proceed.

(Testimony of Robert E. Lyle.)

Q. (By Mr. Gilbert): Now, you have stated that from your computations which you have reduced to this map that the premises of Moose Creek Lodge is how many feet south of the north line of section 34? A. 1181.70.

Q. And what was the measurement from the east line of section 4—34, west line?

A. It is 812.86.

Q. Did you observe the buildings of Moose Creek Lodge on the general premises there?

Mr. McNabb: I object to that question, your Honor. What he observed isn't material.

The Court: Objection overruled.

Mr. McNabb: It has no bearing on this case.

The Court: Go ahead and answer. [47]

The Witness: Yes, I did observe several buildings besides the lodge itself.

Mr. McNabb: Now I object to that and move the answer be stricken as not responsive to the question.

The Court: Motion denied.

Q. (By Mr. Gilbert): From these observations and measurements that you have made, will you tell this court and jury in what portion of section 34 does Moose Creek Lodge and its buildings lie?

Mr. McNabb: I object to that on the grounds it calls for an opinion, no proper foundation laid, nothing to show it is material to the issues involved in this case, no showing that this witness is competent to testify and no showing that there's ever been any proper foundation laid for the question.

(Testimony of Robert E. Lyle.)

The Court: Objection overruled.

The Witness: Moose Creek Lodge lies in the northwest quarter of section 34.

Mr. Gilbert: Your witness—oh, just a minute.

Q. (By Mr. Gilbert): Now what range, township and meridian are you referring to in connection with section 34?

A. Township 2 south, range 3 east.

Q. What meridian? [48]

A. Fairbanks Meridian.

Mr. Gilbert: Your witness.

The Court: Just a minute. How did you arrive at those distances?

The Witness: Which distance was that?

The Court: Any distance that you took in making that survey and map.

The Witness: The distances between the transit stations were lined up by chaining with a steel tape.

The Court: A chain? Very well.

Cross-Examination

By Mr. McNabb:

Q. Mr. Lyle, when you started initially, you said that you went out and found a line from which the brush had been cut and then followed it for 2 miles about to a corner? A. That's right.

Q. Now then, did you use a map to determine primarily where that line—to determine this line from which the brush had been cut? Did you use a map to determine that to show you where you—to show you where it started?

(Testimony of Robert E. Lyle.)

A. No, I had no map of anything north of section 9.

Q. Well, I know now, but do you have a map on which it shows this line which you initially started from and followed to a corner section? [49]

A. No, I don't.

Q. From whence did you get the knowledge of this particular line?

A. I talked to the man in the District Attorney's office, Casperson I think his name is. He told me there was a brushed line there and a witness corner and I was able to locate it when I went out there.

Q. So you used Casperson's opinion to start this survey?

A. Well, I found on checking, his opinion was facts and not an opinion.

Q. You didn't use any map which was purported to be an official map or any other written document or drawing in connection—— (interrupted).

A. I think you're probably referring to a map which the District Attorney has in his possession. I saw it here the day I was in the office but I didn't use it to locate the corners.

Q. What instruments did you use other than the steel tape which you have previously testified to in making these—— (interrupted).

A. Transits.

Q. By whom are you employed?

A. By the Corps of Engineers.

Q. And that is an agency of the United States Government?

A. That's right.

(Testimony of Robert E. Lyle.)

Q. And you work where? [50]

A. I work at Ladd. I am based at Ladd. I work for John E. England, the Resident Engineer, A.P.O. 731.

Q. And you're stationed at Ladd Field?

A. I am on temporary duty at Murphy Dome. My base is Ladd Field.

Q. Did you make any effort to determine whether or not the starting point from your—for your subsequent survey and measurement was in fact correct?

A. No. I went down and found the pipe. It had four pits. One pit north, one south, one west and one east which is a standard mark for a section corner where there are no bearing trees available and I went half a mile south and found the quarter corner for the common sections 9 and 10 which is properly monumented by 2 bearing trees.

Q. When was that initial stake put in there? I believe you said 1938, is that correct?

A. 1934.

Q. '34. How long have you been familiar with that particular location, Mr. Lyle?

A. First time I saw that stake was day before yesterday.

Q. So, you can't testify from your own knowledge that that stake has not been moved since it was placed there in 1934?

A. I can testify it has the standard pits which the land office puts at—— (interrupted).

Q. You can testify it has? [51] A. It has.

(Testimony of Robert E. Lyle.)

Q. It has been moved?

A. No, I didn't say it had been moved.

Q. I say, can you testify from your own knowledge?
A. I—— (interrupted).

The Court: Let him answer the question.

The Witness: I can testify that section 9, I mean the northeast corner of section 9 is a standard iron monument.

Q. (By Mr. McNabb): Yes, I know, but can you testify from your own knowledge that that particular stake has not been moved since the day which it was placed there in 1934?

A. I wasn't at the place—— (interrupted).

Q. You hadn't been at any time since it was placed there have you, except day before yesterday?

A. That's right.

Q. And you don't know whether it has been moved since it was initially put there, do you?

A. I know it has the standard—— (interrupted).

Mr. Hepp: I object. This witness should be allowed to answer these questions and explain his answers and counsel is taking a tone towards this witness that is purely argumentative and I object to it.

The Court: Objection sustained. [52]

The Witness: Can I testify? I can testify that the four pits which are standard to a section corner are there. I can also testify that the quarter corner—— (interrupted).

Mr. McNabb: Your Honor, I—— (interrupted).

The Court: He's answering your question.

(Testimony of Robert E. Lyle.)

The Witness: And I can testify that 2 bearing trees are at the quarter corner.

Q. (By Mr. McNabb): We are talking about one corner there, Mr. Lyle.

A. I know. They're tied together. If I find a quarter corner and half a mile south a point, there's every right to believe that is the right point.

Q. It is conceivable that the second stake could have been moved as well?

A. Not by the evidence on the ground. It is not conceivable.

Q. You mean, so long as you can make the Moose Creek Lodge within the particular area in which you had to find it, then you assume everything is correct?

Mr. Hepp: I object to that. It's an absurd question.

The Court: Objection sustained.

Q. (By Mr. McNabb): Now, did you check any calculations to determine whether or not that first stake was correctly placed? [53]

Mr. Hepp: I object to any further questions on that, your Honor. That is an established land marker of a survey—of an accepted survey and I don't think Mr. McNabb has a right to go into this.

The Court: Objection sustained.

Mr. Taylor: I would like to ask this witness a question, your Honor.

The Court: Very well.

Q. (By Mr. Taylor): Mr. Lyle, I believe you stated that after running your line down to the

(Testimony of Robert E. Lyle.)

northwest corner of section 34, you found what you designated a witness mark?

A. That's correct.

Q. And what was the writing or the inscription upon that witness marker? Will you read it to me again?

A. The stamping on the witness corner was township 2 south, range 3 east, section 33, section 34—wait a minute. I am on the wrong corner. I was giving the description of the meander corner. The witness corner is marked W. C., township 2 south, range 3 east, section 28, section 27, section 33, section 34 and dated 1949.

Q. Just the year date put on there?

A. That's right. It was never more than a year.

Q. Did you find in that vicinity any witness corner of official survey monument prior to [54] 1949?

A. None in the vicinity of this witness corner.

Q. And would you assume from that, that that corner was not established until 1949?

A. That's correct.

Q. I believe section 27 and 34 adjoin, do they not? A. That's correct; 27 is north of 34.

Q. And is there any section west of 34 that shows on that map?

A. Section 33 lies west of 34.

Q. Is that across the Tanana River?

A. I believe it extends across. It would come out and join the west boundary of 34.

Q. And what section is west of 27?

(Testimony of Robert E. Lyle.)

A. Section 28.

Q. Now, on that marker, Mr. Lyle, are there grooves cut across the marker to show the directions in which the section line runs?

A. The grooves are cut to show the exact point and normally they are authenticated to show the direction of the sections lines.

Q. By taking a line out of that marker, you would sight along the direction that is shown by the grooves—by the grooved lines?

A. That would be a very rough method of getting a direction.

Q. But I mean, it points in the same [55] direction.

A. That's correct.

Q. Now, when you run—you say that witness mark was the northwest corner of section 34?

A. No. The witness corner is not the northwest corner of section 34. All a witness corner is is a witness to the true corner. The true corner lies 198 feet north of the witness corner.

Q. And did you find the corner of section 34?

A. No, I did not. The corner is not set because it falls in the road.

Q. It is in the road? A. Yeah.

Q. Of the Richardson Highway?

A. That's correct.

Q. How many feet would you say that was from the true corner?

Mr. Hepp: I object to that unless counsel—
(interrupted).

(Testimony of Robert E. Lyle.)

Mr. Taylor: He just stated that he measured——
(interrupted).

Mr. Hepp: It is indefinite.

Mr. Taylor: I just asked it so I can make a note on it.

Mr. Hepp: Well, I'm just wondering what he's talking about. I didn't hear—— interrupted). [56]

The Court: Make it more definite, Mr. Taylor.

Mr. Taylor: The witness stated that this was a witness corner because the true corner was a certain distance from there and it was in the road and could not be permanently established. I was just asking how far the true corner was from the witness corner.

The Court: Very well.

The Witness: I will have to differentiate there if I may, between the true corner as I set it and as it—as the rough line is cut. That is, this—I didn't set this corner, you understand. I just used it as a traverse point. Now, by measuring up to the east and west line which was cut by the Bureau of Land Management, we arrived at a distance of 198 feet but I differed in distance by 1.6 feet from the land office.

Q. (By Mr. Taylor): About how much differential? A. 1.6 feet.

Q. Now, that line that you found cut there, Mr. Lyle, did that seem to be a fairly recent cutting of a survey line?

A. Yes, it was very recent and well brushed out.

Q. And would you believe that that line had

(Testimony of Robert E. Lyle.)

been brushed out about the time or since the witness corner was established there? [57]

A. It must have been brushed out prior to the establishing of the witness corner.

Q. How do you arrive at that conclusion, Mr. Lyle?

A. Well, the brushing normally precedes the measurement on a survey. I would like to find some way to reverse that, but I can't.

Q. How long do you think it would be preceding the establishment of the corner?

Mr. Hepp: I object to that, your Honor. I think that calls for a conclusion. It is not pertinent to the issues before this court. I don't think it is proper cross-examination. It goes into an entirely new matter.

The Court: Objection sustained.

Q. (By Mr. Taylor): Has there been much brush grown up in that line that had been cut out?

A. No, very little brush has grown up in there.

Q. One other question. You used some points that you would—traverse points that you would designate with an "H," H-1, H-2. What was that "H" designation?

A. I use that for huv. I use "H" as the initial of the word huv.

Mr. Taylor: That's all.

(Testimony of Robert E. Lyle.)

Redirect Examination

By Mr. Hepp:

Q. Now, Mr. Lyle, there has been quite a bit of talk here about witness corners and theoretical positions. In order to clear this matter up, I would like for you to state as a result of your measurements and your computations, do you now know where the northwest corner of section 34, township 2 south, range 3 east, Fairbanks meridian is?

A. I can state that I know it within the limit of about one in five thousand.

Q. You mean that would be one foot in five thousand feet?

A. That's correct. In going two miles then, I can state that the point which we determined would not be off 2 feet which would be about 1 foot per mile.

Q. It could be closer but it couldn't be more than that off, is that correct?

A. That's correct. It could be 2 feet north or south of the position we determined.

Q. Now, as to the Moose Creek Lodge premises, do they lay within 2 feet or within the margin of error that you have testified?

A. No. As I testified before, some 1100 feet from the north boundary to Moose Creek.

Q. Then if you were 2 feet off, that would be 1100 minus 2 feet or 1098 feet within the section?

A. Well, there would still be over 1100. It is

(Testimony of Robert E. Lyle.)

1100 plus [59] that they are south of the boundary. It would still be over 1100 feet south.

Q. And this point you can testify you have established by your computations? Any theoretical measurements were done merely to get a start from which to compute, is that right? I just would like you to make that point clear.

A. I don't quite get your question.

Q. You mentioned you used some theory and some witness points. Your final calculations are the basis of your measurements and computation, is that right?

A. That's correct.

Mr. Hepp: I see.

Mr. McNabb: Your Honor, I move that the testimony of this witness be stricken on the ground and for the reason that no proper foundation was laid for it. He made no effort to permanently establish the truth of the particular point to which he started.

The Court: Motion denied.

Mr. Taylor: Can we have a short recess, your Honor?

The Court: Take a 10 minute recess.

(At this time, a recess was taken.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor. [60]

Mr. Hepp: We so stipulate. I believe that the witness Lyle was on the stand. We have no further questions to ask of him. I believe—— (interrupted).

Mr. McNabb: We have no further questions.

The Court: Very well, then.

Mr. Hepp: Your Honor, at this time, I believe that the defendants are willing to stipulate that a substitution of an exhibit may be made of plaintiff's exhibit "B." They're exact copies which I believe counsel will so stipulate, plaintiff's exhibit "B" being these plats. These are original plats which unfortunately the land office is not allowed to leave get out of their possession and I am afraid Mr. Weiler will have to sleep here in court unless this substitution can be made. They're exact copies, your Honor. Will you so stipulate?

Mr. Taylor: I have no objection to Mr. Weiler taking the stand and testifying that those are true copies of the original map that is in his possession.

The Court: Call your witness then.

FRED J. WEILER

recalled as a witness in behalf of the plaintiff, having been previously sworn, testified as follows:

Redirect Examination

By Mr. Hepp: [61]

Q. Mr. Weiler—— (interrupted).

Mr. McNabb: Just a minute. Your Honor, at this time I am going to object to the admission of this exhibit on the grounds that there has been no showing of any authority to make this survey and on the further grounds that there are many additional lines and figures and so forth on this, on each of these instruments, to which there has not been a certificate made and I am not waiving the

(Testimony of Fred J. Weiler.)

question that these are not originals but that they are in fact copies.

Mr. Hepp: I am willing to limit this substitution just for one document for another and any limitation that counsel may desire to place against one can be placed against the other.

Q. (By Mr. Hepp): Mr. Weiler, I show you plaintiff's exhibit "B" and ask you to examine it please. I show you also what purports to be copies of that exhibit and ask you to examine them and state if you know whether they are the same or contain the same subject matter.

A. May I explain a little? They are not copies. They're prints.

Q. They are prints?

A. Taken from the plat. The information contained on them is identical with the information contained on the original.

Q. Those are identical? [62]

A. These two are in fact identical.

Q. By printing, you mean from the same initial recording device?

A. That's right, similar to a photostat.

Q. I see. That's a mechanical process, is it?

A. Yes.

Q. Then you can state then that those are identical insofar as subject matter that they contain?

A. Yes.

Mr. Hepp: I would like to ask—— (interrupted).

(Testimony of Fred J. Weiler.)

Mr. Taylor: Could I ask another question?

The Court: Yes.

Recross-Examination

By Mr. Taylor:

Q. Now, Mr. Lyle, are there any markings on the original exhibit which are not shown on the copies?

A. Yes, there would be one marking which is not shown on this copy. That would be the certificate; the plat was officially filed in the United States Land Office at 9 a.m. on September 20, 1938.

Q. There is no notations or markings appearing on the original that don't appear on the print?

A. Well, there are some figures in pencil and ink markings, [63] yes. Can I explain just a bit? These original copies which we have in our office are used to maintain status of the land. When someone comes in and applies for a tract of land, a homestead or timber permit, we make either a pencil or an ink notation on this original copy. Those, of course, would not appear on these, but the information in regard to the location of the lines, the coordinates, the bearings are all the same.

Q. To the sectional survey itself, the print is the same as the original?

A. Yes, Mr. Taylor.

The Court: Very well, may be substituted.

Mr. Hepp: We would like permission to withdraw then this original.

The Court: Yes, may be withdrawn.

(Testimony of Fred J. Weiler.)

Mr. Hepp: Mr. Clerk, will you make this substitution, please

(At this time, the original plaintiff's exhibit "B" was withdrawn and copies substituted.)

Mr. Hepp: I have no further questions to ask of this witness.

Mr. Taylor: No questions.

Mr. McNabb: Wait just a minute. Your Honor, to save time calling Mr. Weiler back at a later time, I wonder if we can use him as our witness at this time.

The Court: Yes. [64]

FRED J. WEILER

called as a witness in behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Mr. Weiler, you are familiar, you have testified, with the general location of Moose Creek property? A. Yes.

Q. To the best of your knowledge, has anyone ever filed an application for the particular ground upon which that location is located?

Mr. Hepp: Just a minute, Mr. Lyle. I object to this. There are no pleadings before this court that purport to set up any right, title or interest or right of possession to these grounds and it is not in

(Testimony of Fred J. Weiler.)

issue before this court as having not been pleaded by either of these defendants.

The Court: Objection sustained.

Q. (By Mr. McNabb): Mr. Weiler, to the best of your knowledge, is the location of the Moose Creek Lodge ever been established by any previous surveys?

Mr. Hepp: I am going to object to that as irrelevant and immaterial, has no bearing on this trial here. I don't think this witness is qualified to answer [65] that question anyway and there may be a purported establishment or something like that and a foundation has not been laid for that.

The Court: Objection overruled.

The Witness: Yes.

Q. (By Mr. McNabb): Are you familiar with who made that survey, Mr. Weiler? A. Yes.

Q. And when it was made?

A. Generally, yes. I couldn't give you the exact date.

Q. Do you know whether there was more than one survey made to determine the position of the Moose Creek Lodge property? A. Yes.

Q. Do you know why there was more than one survey made? A. Yes.

Q. Do you know who made all of the surveys?

Mr. Hepp: Now, I am going to object to any further talk about survey unless counsel defines what he means as a survey. People sometimes step off a distance and say they have surveyed it. There is no showing that these are surveys. I think cer-

(Testimony of Fred J. Weiler.)

tainly foundation questions are required in order to make this proposition clear.

The Court: Objection overruled.

The Witness: I know the person who made the —name of the person who made one of the surveys. I do [66] not know the name of the actual surveyor who made the other.

Q. (By Mr. McNabb): What is the name of the person whom you know made a survey there, Mr. Weiler? A. Lloyd Toland.

Q. What position does he occupy?

A. Cadastral engineer, Bureau of Land Management.

Q. Do you know of your own knowledge what he found to be the location of the Moose Creek Lodge?

Mr. Hepp: Just yes or no, please.

The Witness: Yes.

Q. (By Mr. McNabb): Does that location correspond to the location which has been determined by the survey made yesterday to which testimony was given in this court this morning?

Mr. Hepp: I object. Just a minute, Mr. Weiler. I object to that, your Honor, as irrelevant and immaterial. There was a survey attempted to be introduced at which time counsel objected which had Toland's name on it. I think if it is inadmissible to show one, it is inadmissible to show another. I object to any information concerning that survey upon the same grounds that counsel initially objected to it.

The Court: All right. I'll sustain the [67] objection.

(Testimony of Fred J. Weiler.)

Mr. McNabb: Your Honor, that — sustaining that objection would make this survey conclusive, would it not?

The Court: How's that? I can't understand you, Mr. McNabb.

Mr. McNabb: I say, if we are not able to introduce testimony tending to show that there has been surveys made which are different and established a different location than the one established here this morning, that would make this conclusive.

Mr. Hepp: Your Honor, in argument to that, I would like to state that I have no objection to introducing Mr. Toland or laying a proper foundation for that survey so that we can show if there is an error how it came about. But certainly, this witness is not qualified to discuss a survey that was made by someone else on the same grounds that it was initially objected to in this trial and I am going to object and I don't think—feel there is any conclusiveness of any survey established by this proposition. I am objecting to this because this witness is not qualified to speak or to answer concerning any possible error or discrepancy or how it came about.

The Court: Well, it would be an attempt to prove a survey by oral testimony. The survey itself or the plat would be the best evidence. [68]

Mr. McNabb: That's correct, your Honor. All I want to know is—of this witness who is the general manager of the land office, is if he knows of his own knowledge that surveys were made which

(Testimony of Fred J. Weiler.)

would establish a different location than the other one here.

The Court: You mean in a different section?

Mr. McNabb: Yes, sir, or show that there is only a portion of that property there within the section. We have a right to introduce testimony showing that.

The Court: The best evidence is the map itself.

Q. (By Mr. McNabb): Do you know whether maps were made each and every time that a survey was made of that property? A. Yes.

Q. Were such maps made? A. Yes.

Q. Now, Mr. Weiler, do you have those maps in your possession?

Mr. Hepp: I object to that, your Honor, unless he defines the maps as officially approved maps. I don't think they are proper evidence to show what they purport to show unless they are officially filed with the land office and approved by Washington. Those are the limitations which counsel placed on the government in attempting to show [69] a survey.

The Court: Objection overruled.

The Witness: I do not have them in my possession at the present time.

Q. (By Mr. McNabb): Have you had them in your possession, Mr. Weiler? A. I had.

Q. Is the location of Moose Creek Lodge shown on those maps? A. Yes.

Q. Do you know where those maps are, Mr. Weiler? A. Not definitely.

(Testimony of Fred J. Weiler.)

Q. Now Mr. Weiler, you are familiar with those maps, are you? A. Yes.

Q. And how many such maps are there?

A. Two.

Q. Are those maps—do those maps, Mr. Weiler, show an identical location of the Moose Creek property?

Mr. Hepp: I object to that question, your Honor. The maps are the best evidence as to what they show and I don't think this witness is qualified to answer that question.

The Court: You have not made any showing for the use of oral testimony in place of the map. Therefore, [70] you must introduce the map itself.

Q. (By Mr. McNabb): Mr. Weiler, do you know where those maps are?

A. Well, I think I know.

Q. Would you state to the best of your knowledge?

A. I think—I believe the District Attorney has one of them. The other one was filed in my office and may be there now. I would have to examine the case files or they may have been sent to Washington.

Mr. McNabb: Your Honor, if the District Attorney has in his possession a map which purports to show the location of the property in question here, I would request that be produced in court.

Mr. Hepp: In the first place, your Honor, I believe the court will find that is government's identification number two. In the second place, I object to any further discussion on this map unless

(Testimony of Fred J. Weiler.)

there is a foundation shown that it would be admissible as tending to show the location of any property or premises that are subject matter of this suit. I will offer that objection to every question that counsel has pertaining to that. I am willing on the court's order to produce that map. In fact, I don't have to. It's here already. I object to any further discussion on it unless the foundation questions are laid.

The Court: If it is already one of the [71] identifications, I will sustain the objection to oral testimony about it.

Q. (By Mr. McNabb): Mr. Weiler, are you acquainted with Lyle F. Jones? A. I am.

Q. What is his official position?

A. He is office cadestral engineer for the Division of Engineering, Bureau of Land Management.

Q. He is an employee of the United States Government, is he? A. That's correct.

Q. And what are his primary duties, if you know?

A. Just what the title implies. He is in charge of the office work of the cadestral engineering service, checking the work of surveyors, making up plats of survey from the field notes submitted by the surveyors, certifying as to correctness of the work done by those surveyors.

Q. Mr. Weiler, I hand you an instrument which is purported to be a map or plat. Do you know what that instrument purports to be?

(Testimony of Fred J. Weiler.)

A. Survey of section 34, township 2 south, range 3 east, Fairbanks meridian.

Q. Is Moose Creek Lodge property located on that plat? A. It is.

Q. Now, Mr. Weiler, I ask you to examine that instrument [72] and tell me if you can whether the location of the Moose Creek Lodge property from the east boundary and the north boundary is identical on this map with the one which you see here?

Mr. Hepp: Just a minute, Mr. Weiler. Now, I believe I am going to object to any—to that question, your Honor, inasmuch as this map is not in evidence. This witness is not qualified to express any information that is set forth in this map as to the exactness of a position.

The Court: May I see it?

(Document handed to Court.)

The Court: This is plaintiff's identification number 2 that you attempted to introduce, Mr. Hepp, is it?

Mr. Hepp: Yes, it is, your Honor.

The Court: The map shows the property to be the Moose Creek Lodge in the section alleged in the pleadings—in section 34. It is perfectly immaterial any of the details about any difference in the number of feet from one side or the number of feet from the other. I will sustain the objection.

Mr. McNabb: On the grounds that so long as it is in that section—— (interrupted.)

The Court: So long as it's in the section. That's the only point in question here. [73]

(Testimony of Fred J. Weiler.)

Mr. McNabb: Your Honor, if in fact the distances as shown by that particular map are different from those shown by the other—by the map which is now in evidence, this diagram here—it is my opinion that that will raise a presumption that somebody is not correct and it will very well be outside of this area entirely.

Mr. Hepp: Your Honor, in that respect, I'd like to state that I don't know whether there is a difference. They may be identical but I think that it's just as this other surveyor said. He explained the amount of error that could possibly come in and that's one in five thousand. There's a good chance the surveyor of this map if he made this would explain as to a possible error and that would explain away all possible discrepancy and place the issues of this—the land in issue before this court well within section 34 and I think it's prejudicial to go into a matter of error which may be in fact very insignificant but unexplained be a big issue.

The Court: I have sustained the objection to it on the evidence.

Q. (By Mr. McNabb): Mr. Weiler, as the representative or the officer in charge in the Fairbanks office of the Bureau of Land Management, I will ask you to search your memory and recall if you can whether you, in a conversation with Mrs. Nell Kelly, did [74] not tell her at one time that her lodge was only 6 feet within section 34?

Mr. Hepp: Now, I object to that as a leading question. This is counsel's witness. I don't think

(Testimony of Fred J. Weiler.)

that's a proper question on direct. I don't think it's proper and it's prejudicial.

The Court: Objection sustained.

Q. (By Mr. McNabb): How many talks have you had with Mrs. Kelly, Mr. Weiler, concerning the location of that property, Moose Creek Lodge property? A. Numerous.

Q. Have you ever discussed with her the particular location of the property?

Mr. Hepp: I object to that, immaterial and irrelevant to the issues before the court; has no bearing and counsel hasn't in his pleadings purported to set up any right, title or interest of Nell Kelly or anyone else in section 34 or any portion of it and I object to any discussions.

The Court: Objection sustained.

Q. (By Mr. McNabb): Mr. Weiler, has the Bureau of Land Management ever made an effort to have Mrs. Kelly removed from the Moose Creek property?

Mr. Hepp: I object to that, immaterial; [75] has no bearing on the issues before this court.

The Court: Objection sustained.

Q. (By Mr. McNabb): Mr. Weiler, has not the government on more than two occasions stated to Mrs. Kelly (interrupted).

Mr. Hepp: I object.

Mr. McNabb (Continuing): From your office (interrupted).

Mr. Hepp: Just a minute, Mr. McNabb. I object to counsel—to framing of this prejudicial question.

(Testimony of Fred J. Weiler.)

The Court: If you wish to come forward and make your offer, Mr. McNabb, I'll hear you.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. McNabb: I believe that we can show your Honor that there were various conversations between Mr. Weiler as the chief of the Office of the Bureau of Land Management in Fairbanks that there have been several conversations with Mrs. Kelly and that the position—the relevant position of the Moose Creek Lodge buildings has been changed over a period of years in statements to Mrs. Kelly—first showing that she was not within section 34; later that the building, the main building was only six feet within section 34 and that later that was moved—the line was theoretically moved over again to embrace a larger portion of the building and then [76] now that it is determined by this survey and others that it is substantially within section 34. I think we should have an opportunity to show this jury that this particular survey is not necessarily conclusive, that there have been other surveys made which indicate that the buildings are not within section 34.

Mr. Hepp: I object to that on the grounds—in the first place, that right, title or interest is not set up in this defendant through the pleadings—second place, that any survey that purported to show location of these grounds is offered into court as not under the best evidence rule and through

(Testimony of Fred J. Weiler.)

someone's memory and no showing that any of these surveys were official or were even made by a licensed surveyor or a graduated surveyor. I object to any showing. The best evidence (interrupted).

The Court: All right, objection sustained.

(The following proceedings were continued in the presence and hearing of the jury.)

Q. (By Mr. McNabb): Mr. Weiler, do you know how many surveys had been made by the United States Government or some person under the Bureau of Land Management which would indicate whether or not Moose Creek Lodge was within section 34?

Mr. Hepp: Your Honor, this question shows the same pattern (interrupted). [77]

The Court: It's the same thing. The objection is sustained to that line of questioning, Mr. McNabb.

Q. (By Mr. McNabb): Do you have in your office any maps which are purported to be the official survey of section 34 which we are discussing?

A. No.

Q. Did you ever have any maps other than the ones which are in this court, Mr. Weiler, which purported to show section 34?

Mr. Hepp: I object to that, your Honor, unless he shows what kind of a map he's talking about. I don't—a tracing or sketch might be considered by some to be a map. The question is very indefinite.

(Testimony of Fred J. Weiler.)

I think he should be confined to official surveys or otherwise to lay a foundation for some other kind of a map.

The Court: Objection sustained.

Q. (By Mr. McNabb): Do you have any official surveys in your office, Mr. Weiler, of section 34?

Mr. Hepp: I believe I am going to object to that until he states the township, range, and meridian. This land office may indeed have numerous section 34's. The question is indefinite.

Mr. McNabb: The section 34 which we are discussing, Mr. Weiler. [78]

Mr. Hepp: Add that to your question then, Mr. McNabb.

The Witness: That depends on what you mean by an official survey. A survey — the plats we brought in before would be the official survey of that township, range and sections as shown on there. The official—the word “official” there is used as a title. We make many titles which are official and recognized which do not have that particular title. The same difference between calling you Mr. McNabb or just McNabb. Mr. is the title. A survey would be official if it were made by any recognized surveyor or for any particular property, even though it might not be called “Mr. official” map.

Q. (By Mr. McNabb): Mr. Weiler, do you have or have you had any maps purporting to show this section 34 which we are discussing which was

(Testimony of Fred J. Weiler.)

made by an employee or an engineer of the Bureau of Land Management (interrupted). A. Yes.

Q. (Continuing): Who had authority to make such surveys and to make maps and plats from the notes and records which he kept and made at the time he was making a survey?

Mr. Hepp: I object to that question unless counsel defines what he means by authority. Authority can—to make a particular map is something different than [79] —and I might add to bind the government or any other party—is something different than the authority to go out and go over land and make a survey. I object to the question.

The Court: It seems to me it is very indefinite. If you think there is any map up in that land office that will do you any good, go up and get Mr. Weiler to show you what there is on the subject during the noon hour and bring it down here.

Mr. McNabb: Your Honor, Mr. Weiler stated a few moments ago that he had one and sent it to Washington.

The Witness: I may have. I am not certain of that.

The Court: We will—you can go up there and find out if there's anything there that does you any good. Bring it out and attempt to introduce it. If it's admissible, we will put it in.

Mr. McNabb: Very well, your Honor.

The Court: All right. Are you through with this witness otherwise?

Mr. McNabb: Yes, your Honor.

The Court: Well, we will take a recess then until 1:30. The jury is excused until two o'clock however.

(At 12 o'clock noon, the trial of this [80] cause was recessed until 2 o'clock p.m.)

(At two o'clock p.m., the trial of this cause was resumed.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: The calendars that were set for this afternoon will have to go over until the next calendar day, next Friday. Counsel ready to proceed with the trial of this case?

Mr. Gilbert: Ready, your Honor.

Mr. McNabb: Ready, your Honor.

The Court: Very well.

Mr. McNabb: May it please the court, Mr. Weiler has advised me that the only map which he has in his office discloses that the property in question here is in fact in section 34. The court having already ruled that any discrepancy in the measurements of the distances in that map and this one as not material to this action, I have no further questions to ask Mr. Weiler.

The Court: Very well.

Mr. Taylor: If the Court please, I would like to file an amended answer of the defendant, [81] Thomas Jones, in the present case. I have served

the United States Attorney with a copy of the answer.

The Court: May I see it?

(Document handed to court.)

Mr. Hepp: I would like to lodge a motion against this before your Honor finally considers this matter. After you have finished reading it, I would like an opportunity to talk.

The Court: Yes. (Pause.) Mr. Taylor, you wish to have the jury excused?

Mr. Hepp: I don't believe anything I have is prejudicial.

The Court: Very well. State your objection.

Mr. Hepp: I would like to ask the Court that if this amended answer be allowed, that the government be given an opportunity to strike all but paragraphs 1 and 2.

The Court: Are you objecting to the filing of the amendment?

Mr. Hepp: Well, I don't believe I have a right. A party can always file an amended pleading as I understand it, your Honor.

The Court: Well, they can if they state a defense, but I don't think this states a defense.

Mr. Hepp: That was my argument if [82] proved—if the issues were proved here, that it would constitute no lawful defense.

The Court: I'll deny the motion to amend. Anything further here?

Mr. Hepp: I believe that Mr. Weiler was on the stand and that counsel had received permission to

question him rather than calling him during his case.

The Court: He just stated he had no further testimony to put on, Mr. McNabb did.

Mr. Hepp: Oh! We will call Captain Jones then.

HARWELL H. JONES

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gilbert:

Q. State your full name to the court, please.

A. Harwell H. Jones, Captain, United States Air Force.

Q. Where are you stationed, Captain Jones?

A. At Eilson Air Force Base.

Q. Are you acquainted with the defendant in this case, Tommy Jones—Thomas Jones?

A. I know Mr. Tommy Jones, yes.

Q. Where did you meet Mr. Tommy Jones? [83]

A. I believe I met Mr. Jones at Moose Creek Lodge. The first time I met him I wouldn't be sure. It is possible I met him in the Provost Marshal's office at Eilson.

Q. Did you have any conversation with Mr. Thomas Jones the first time?

A. Yes, I believe I did.

Q. Do these conversations relate to Moose Creek Lodge in any way?

A. Not the first time that I met Mr. Jones. I

(Testimony of Harwell H. Jones.)

believe it was relative to the loss of some property that he told me about.

Q. Have you had any conversations with Mr. Thomas Jones regarding Moose Creek Lodge?

A. I have on several occasions, yes.

Q. Were any statements made regarding who occupied and operated Moose Creek Lodge?

A. I don't recall the specific statements. It was my opinion that (interrupted).

Mr. McNabb: Just a moment. Your Honor, we object to opinion evidence.

The Court: Objection sustained. You don't have to state it in exact words. It can be in substance. Do you have a substantial recollection of the conversation about the occupancy of that lodge?

The Witness: Your Honor, I don't know [84] whether we had any definite conversation relative to the occupancy of the lodge other than he was the proprietor of the lodge as represented to me.

Q. (By Mr. Gilbert): You stated as represented to you? Was Mr. Jones—Thomas Jones present when these representations were made?

A. I don't recall whether he was present when the representations was—were made. In a period of over 15 months it would be very hard for me to say.

Q. Have you had occasion to visit Mr. Thomas Jones at Moose Creek Lodge or other places?

A. Yes, on several occasions.

Q. Where did you visit him?

(Testimony of Harwell H. Jones.)

A. Well, I had been—I have visited him at Moose Creek Lodge.

Q. Once or more than once?

A. On several occasions.

Q. At the times you visited him, who was operating and occupying Moose Creek Lodge?

Mr. Taylor: Just a moment, Captain. We are going to object to the question, calling for a conclusion of the witness.

The Court: Objection sustained. You can show what acts Mr. Jones was taking which might throw light on who the occupant was—the owner of the lodge. [85]

Q. (By Mr. Gilbert): When you visited Mr. Jones at Moose Creek Lodge, what was he doing?

A. Well, I didn't observe him doing anything. He was present at the lodge. Possibly he was writing a letter or something at the time I walked in. I don't recall exactly what he was doing. He was present at the lodge.

Q. Did you ever have any conversation with Mr. Jones in regard to the operation of the lodge in your official capacity as an officer?

A. I did on several occasions.

Q. Tell the court what these conversations concerned?

Mr. Taylor: Just a moment, Captain. I am going to object until a proper foundation is laid as to conversations with the defendant Jones.

The Court: This is a strange situation. The complaint in this case says that Mr. Jones and Nell

(Testimony of Harwell H. Jones.)

Kelly unlawfully held and do now unlawfully withhold the possession of these lands. Now then, Mr. Jones has denied that altogether. Why not just dismiss the case at that if he has no interest in it? He says he has no interest in it at all, so why should he be allowed to take up time questioning here?

Mr. Gilbert: Well, may it please the court, we would like (interrupted).

The Court: Of course, you can call Mr. [86] Jones if you want to. Call him as a witness.

Mr. Gilbert: You mean Mr. Thomas Jones?

The Court: I beg your pardon?

Mr. Gilbert: You mean Mr. Thomas Jones, your Honor?

The Court: Yes, surely.

Mr. Taylor: I might say in that respect, your Honor, that is the reason I filed the amended answer for the reason that Tom Jones is—the allegation of paragraph two of the complaint says he is unlawfully withholding the lands described in here since 1942. I made an affirmative defense to that to show he is lawfully on the ground and he was there in good faith. That was the only reason for filing this amended answer, your Honor.

Mr. Gilbert: May it please your Honor, I would like to file a motion at this time out of the hearing of the jury.

The Court: Very well. The jury may retire in the hallway and remain there until called.

(Testimony of Harwell H. Jones.)

(At this time, the jury left the courtroom and the following proceedings were had out of the presence and hearing of the jury.)

Mr. Hepp: Your Honor, with some embarrassment, I would like leave of the court for a 15-minute recess. [87]

The Court: Very well.

Mr. Hepp: I know you're in a hurry to conclude this case.

The Court: We will take a 15-minute recess.

(At this time a recess was taken.)

(At the conclusion of the recess, the trial of this cause was resumed.)

Mr. Gilbert: We had contemplated at this time entering a motion but we have reconsidered and we would like to proceed in the presence of the jury with the questioning of Captain Harwell Jones.

The Court: Very well, call the jury.

(The jury reentered the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Gilbert: Yes, your Honor.

Mr. Taylor: Yes, your Honor.

The Court: Very well, proceed.

(Captain Harwell Jones resumed the witness stand and testified as follows.)

Q. (By Mr. Gilbert): Captain Jones, you have stated that you were stationed at Eilson Air Force

(Testimony of Harwell H. Jones.)

Base. What are your duties at Eilson Air Force Base? [88]

A. My duties are C.O. of the Air Police Squadron as Air Wing Provost Marshal.

Q. Now, as Air Wing Provost Marshal, have you ever had occasion to visit Moose Creek Lodge?

A. I have, sir.

Q. What was your reason for that visit?

A. As I recall, I went out there on one occasion to inform Mr. Jones to remove his slot machines from the lodge in accordance with the decisions of the station.

Q. Was that Mr. Thomas Jones to whom you have referred previously? A. Yes.

Q. Why did you give the notice to Mr. Jones?

Mr. Taylor: Just a moment. Your Honor, I am going to object to the question, calling for a conclusion of the witness. I think what he did is the best evidence.

The Court: Objection sustained.

Q. (By Mr. Gilbert): When you delivered the notice to Mr. Jones to remove the slot machines, was anyone else present in Moose Creek Lodge?

A. I believe there were several people present but I don't recall who they are.

Q. Did you give any of these other people notice to remove slot machines from the premises? [89]

A. I did not.

Q. You have stated you have had conversations with Mr. Jones prior to this time, is that correct?

A. Yes, sir.

(Testimony of Harwell H. Jones.)

Q. What did these conversations—well, first, I'll say: When, prior to the issuance of a notice to remove slot machines, did you talk to Mr. Thomas Jones?

Mr. Taylor: Just a moment, your Honor, I am going to object to the question upon the grounds there was no time set for the conversation in regard to the slot machines and makes it indefinite.

Mr. Gilbert: I will withdraw that question.

The Court: Very well.

Q. (By Mr. Gilbert): When did you give this notice to Mr. Jones to remove the slot machines?

A. I believe it was shortly after New Year's of 1951. It was in the early part of January, as I recall, of '51.

Q. Now, did you see Mr. Jones before this date?

A. Yes.

Q. In addition to this one time in January, 1951, did you ever have any conversations with Mr. Jones regarding the management of Moose Creek Lodge?

A. Yes. [90]

Q. Did you have these conversations on more than one occasion?

A. I don't believe so. I talked to him on one occasion about the management of the lodge.

Q. At any time, did he indicate who the manager of the lodge was?

Mr. Taylor: Just a moment, Captain. I am going to object to the question until it is shown that the conversation to which he is questioning was prior to the institution of the action of the United States of America versus Nell Kelly and Thomas

(Testimony of Harwell H. Jones.)

Jones, which the issuance of the summons showed it to be on the 9th day of January, 1951.

The Court: Objection overruled.

Q. (By Mr. Gilbert): Will you answer the question please?

A. I talked to Mr. Jones on one occasion relative to the sale of liquor in the bottle, that is, packaged liquor.

Q. Did he indicate who the manager of Moose Creek Lodge was?

Mr. Taylor: Just a moment. I am going to object to what Mr. Jones indicated. I think the statement of what Mr. Jones said in answer to a direct question by this witness (interrupted).

The Court: Objection sustained.

Q. (By Mr. Gilbert): Captain Jones, do you know who the manager of Moose [91] Creek Lodge was in January, 1951?

Mr. Taylor: Just a moment, your Honor. We are not objecting to the question as it's not who is the manager of the Moose Creek Lodge in this cause but it is as to who is the possessor of it at this time. A manager might be a hired employee.

The Court: I think you should limit it to possession—occupancy.

Q. (By Mr. Gilbert): Do you know who possessed and controlled (interrupted).

A. To my knowledge, Mr. Tommy Jones controls the Moose Creek Lodge.

Q. That was in January, 1951? A. Yes.

Mr. Taylor: If the Court please, I am going to

(Testimony of Harwell H. Jones.)

move that the answer of the witness be stricken and the jury to disregard the same as not responsive to the question, it calls for a conclusion of the witness.

The Court: Motion denied.

Mr. Gilbert: No further questions.

Cross-Examination

By Mr. Taylor:

Q. Now, Captain Jones, you stated that to your knowledge—would you please state what the basis of your knowledge [92] was that Mr. Jones was the operator and in possession of Moose Creek Lodge?

A. He introduced himself to me as the operator or the proprietor of Moose Creek Lodge sometime in February of 1950.

Q. of '50? A. That's right.

Q. And just what was the exact words in which he stated that he was the operator and manager of the Moose Creek Lodge?

A. In substance he stated that someone had broken into his house located on the Moose Creek Lodge property and had removed therefrom certain items of jewelry.

Q. That is, he at that time claimed that he had a house at Moose Creek Lodge? A. Right, sir.

Q. And from the fact that he stated that he had a house there, that you assumed then that all the buildings at the Moose Creek Lodge was under his control and in his possession?

A. That's right, sir.

(Testimony of Harwell H. Jones.)

Mr. Taylor: If the Court please, I am going to renew the objection to the answer of the witness to the previous questions and ask they be stricken.

The Court: Motion denied.

Q. (By Mr. Taylor): Is that the only information that you have to connect Mr. Jones as the operator of the Moose Creek Lodge? [93]

A. No. I have talked to Mr. Jones on several occasions relative to the operation of the lodge.

Q. And in any of those conversations, did he make a direct statement that he was the owner?

A. I don't believe he made the direct statement that he was the owner of the lodge. He showed himself as the owner of the lodge to me. He represented to me that he was the owner of the lodge.

Q. What words did he use in representing himself as the owner of the lodge?

A. I don't recall the exact words.

Q. You have assumed from something that he had said, but you don't remember now that he was the owner?

A. In my official capacity as Provost Marshal, why, we have air police who answer any kind of calls to the lodge due to conduct of military personnel and as a routine check periodically also drive by there to see if government vehicles are parked in the vicinity of the lodge and on that working basis, it is my opinion that Mr. Jones is the proprietor of Moose Creek Lodge.

Mr. Taylor: If the court please, we are going to

(Testimony of Harwell H. Jones.)

move to strike opinion testimony. There's no foundation for such an opinion.

The Court: What part do you want to move to strike? [94]

Mr. Taylor: That which is his opinion that Mr. Jones was the owner and operator of Moose Creek Lodge.

The Court: Motion denied.

Q. (By Mr. Taylor): Do you know, Captain Jones, how long Mr. Jones has resided at Moose Creek Lodge? A. I do not.

Q. Do you know whether Mr. Jones was—has been on Moose Creek Lodge since 1942?

A. I do not.

Q. When did you first learn that Mr. Jones was living at Moose Creek Lodge?

A. In February of 1950.

Q. Do you know who owns the buildings on Moose Creek Lodge, Captain Jones?

A. I do not.

Q. So your knowledge then extends as to who is operating a road house at Mile 23 on the Richardson Highway known as the Moose Creek Lodge?

A. That's correct.

Q. I take it from your answer, Captain, that you don't know who owns the buildings and improvements there?

A. No, sir; I do not know the owner. I have never seen a bill of sale or title to the property in any one's name.

Mr. Taylor: I believe that's all. [95]

Mr. Hepp: No further questions.

The Court: That's all, Captain.

(The witness left the stand.)

Mr. Gilbert: May it please your Honor, at this time I offer in evidence plaintiff's identification number four.

The Court: May be admitted.

(Mr. Gilbert proceeded to remove identification number four from the board upon which it had been exhibited for the jury.)

The Court: Why not leave it right on there?

Mr. Gilbert: All right, sir.

Clerk of the Court: Plaintiff's Exhibit "C."

(At this time, Plaintiff's Identification Number 4 was offered in evidence and marked as Plaintiff's Exhibit "C.")

Mr. McNabb: I am going to object to that as not the best evidence, no proper foundation laid, and further that there is no authority for the drawing; that it is not the best evidence; calls for a conclusion, and not material to the issues involved in this case.

The Court: Motion denied; objection [96] overruled.

Mr. Gilbert: Plaintiff rests.

Mr. Taylor: If the court please, at this time, in view of the statements—testimony of Captain Jones, I would like to renew my motion to file the amended answer in this case.

The Court: Motion denied.

Mr. Taylor: I would like to call Thomas Jones.

THOMAS A. JONES

called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Would you state your name, please?

A. Thomas A. Jones.

Q. And where do you reside, Mr. Jones?

A. Mile 23, on the Richardson.

Q. And is there any other designation for the place that you occupy at Mile 23?

A. Well, it's the—the area is called Moose Creek Lodge.

Q. And how long have you been residing at Moose Creek Lodge, Mr. Jones?

A. Since May 5, 1947.

Q. At the time that you went onto the property, your residence at Moose Creek, who was the owner or the reputed [97] owner of the premises?

Mr. Hepp: Now, just a minute. I object to that question, your Honor. I don't know that this witness could answer that, and besides that goes to the ownership of Moose Creek and it is not set forth in the pleadings of this defendant, and I don't believe that he can go into it. It is irrelevant and immaterial. I object to it.

Mr. Taylor: If the court please, this defendant has denied in his answer that he was unlawfully on that property since 1942, and I think we can show

(Testimony of Thomas A. Jones.)

competent evidence that he was in good faith on there.

The Court: I'll sustain the objection.

Mr. Taylor: If the court please, perhaps the court didn't hear all the question. I said and—"or the reputed owner of the premises."

Mr. Hepp: I object to that "reputed owner," too.

The Court: It is not a material matter in this case at all.

Mr. Taylor: I would like to have this marked for identification.

Clerk of the Court: Defendant's identification "A."

(At this time, a lease designating Nell Kelly as lessor and Thomas A. Jones as lessee, was marked [98] for identification as Defendants' Identification "A.")

Q. (By Mr. Taylor): Mr. Jones, I hand you defendants' identification "A" and ask you to state, if you can, what that is. Will you look it over?

Mr. Hepp: Just yes or no, please.

Mr. Taylor: Just state, if you know, what that is.

The Witness: Yes.

Mr. Taylor: I think counsel should get back until I finish identifying this.

The Court: I think you should show him the paper before you question the witness about it. Show it to him first.

(Testimony of Thomas A. Jones.)

(Document handed to Mr. Hepp.)

Q. (By Mr. Taylor): What is that, Mr. Jones?

The Court: Just a minute. Don't answer, Mr. Jones.

Mr. Hepp: May it please the court, I object to any further questions concerning this identification. It doesn't appear to have any—it doesn't solve any of the material issues before this court. It doesn't bear on any of the pleadings, and—which the defendant has filed concerning Moose Creek Lodge or any arrangements surrounding [99] that, and I object to any questions as prejudicial concerning that.

The Court: May I see it?

Mr. Taylor: Yes, sir (handing document to court). I would like to make an offer of proof after the court has examined this, your Honor.

The Court: Very well; come forward and make your offer.

(The following proceedings were had out of the presence and hearing of the jury:)

Mr. Taylor: This is a lease from Nell Kelly to Thomas Jones. In the complaint it states that Thomas Jones was unlawfully withholding that land from the United States Government since 1942, and we want to show by this lease that he is on that ground under what he considered a valid lease. He went on prior to the execution of the lease, but the lease was made in 1948 and he has been holding

(Testimony of Thomas A. Jones.)

under that lease in good faith and that he had a right on the property. It is to negative the allegations that he was unlawfully on the property. I think he has a right to show it, your Honor.

Mr. Hepp: I object to that, because any claim he would have would be subordinate to the claim of the lessor. There is nothing in the pleadings that sets up any right, title or interest. Color of title doesn't mean good [100] faith in that sense at all, and there's no showing that this represents any good faith and it doesn't show that he wasn't unlawfully on there as against the true owner. I believe that this would be subordinate—certainly his possession on that ground is no better than the lessor's possession, and there's no showing that the lessor had any right, title or interest, and there's nothing in the pleadings which sets that out, and I object to that.

The Court: Objection sustained.

Mr. Taylor: I was going to make the further offer, your Honor, to back this up, by the testimony of Nell Kelly by deposition to show that she believed that she was on there under a valid homestead application on the southeast quarter of section 27, and that she was inadvertently placed on section 34 by the Bureau of Land Management under a mistaken belief because there was no survey at the time showing that. I want to show there was no unlawful—— (interrupted).

The Court: The plaintiff doesn't ask for any damages against Mr. Jones, and there's no question

(Testimony of Thomas A. Jones.)

of any set-off by reason of that. He's limited to a set-off against damages claimed, but there are no damages claimed, so your offer is denied. [101]

Mr. Taylor: The only thing I wanted to show, your Honor, is that under that lease he has spent in excess of \$50,000 in improvements; not to show that he was not unlawfully on there.

The Court: Offer is refused.

(The following proceedings were had in the presence and hearing of the jury:)

Mr. Taylor: That's all, Mr. Jones. You may take the witness.

Mr. Hepp: No questions.

The Court: That's all, Mr. Jones.

(Mr. Jones left the witness stand.)

The Court: Call your next witness.

Mr. Taylor: No more witnesses.

Mr. McNabb: We rest, your Honor.

The Court: Very well.

Mr. Hepp: At this time, we would like to make a motion out of the hearing of the jury.

The Court: The jury will remain in the hallway until called.

(At this time, the jury left the courtroom.)

Mr. Gilbert: May it please your Honor, at this time, the plaintiff moves for a directed verdict on the grounds that it has made its prima facie case. It has [102] not been controverted in no manner from the facts before the court. The plaintiff is entitled as a matter of law to a verdict.

Mr. McNabb: Your Honor, I object to the motion on the grounds that the evidence which has been produced here is not the best evidence, was not competent, and therefore the plaintiff has not made out a *prima facie* case or has not made out any case upon which relief should be granted to them. There is no authority shown on the part of any individual to make any of the maps or plats which were produced here. Those instruments were not, nor were they purported to be, originals. At no place was there an actual signature and certificate or a seal by the Commissioner of the Bureau of Land Management located in Washington and on those instruments the plaintiff in this case has attempted to prove its case. They made no showing whatever, your Honor, that any official map certified to be true and correct by the Commissioner was prepared or that it wasn't an official one prepared, and if there was, your Honor, such an official map prepared showing the exact and precise location of that lodge—and they have not produced such a map in this court—then the instruments upon which their case has been based are not the best evidence, and there is no showing in any of the instruments in this action that the requirements of the law have been complied with showing whether the [103] Moose Creek is located in a section which was withdrawn, and on grounds which is not subject to entry.

Mr. Taylor: I would like to add to that motion, your Honor, an additional ground that all the testimony in this case has shown that the northwest quarter of section 34, township 2 south, range 3

east, is in the Eilson Field Air Base. There has been no testimony of any kind or nature that section 34 lies in the flood control area as described in the complaint. We believe that's — and also there's no maps, official maps, showing—or survey—showing the actual location of the Moose Creek Lodge, and the only testimony to that is oral testimony and not supported by a competent map or survey of the area.

The Court: Motion is granted. Call the jury.

(At this time, the jury re-entered the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Gilbert: Yes, your Honor.

Mr. Hepp: We so stipulate.

The Court: Mr. Taylor, Mr. McNabb?

Mr. McNabb: Oh, yes, your Honor, we so stipulate.

The Court: Very well. Ladies and [104] gentlemen of the jury, a motion for a directed verdict has been made. The evidence in this case shows that the government is entitled to a verdict—uncontroverted. You will therefore sign the verdict which I have prepared. Mr. Johnson, I'll appoint you foreman of the jury to sign this verdict.

(The Clerk of the Court presented the verdict to Mr. Johnson, who signed as foreman.)

The Court: Verdict may be read and filed.

(Whereupon, the Clerk of the Court proceeded to read the verdict as follows:)

In the District Court for the District of
Alaska, Fourth Judicial Division
No. 6681

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELL KELLY and THOMAS JONES,

Defendants.

VERDICT

We, the Jury, duly empaneled and sworn to try the above-entitled cause, do from the law and the evidence therein, find that at the time this action was commenced, to wit: January 9, 1951, and for many years theretofore and [105] at all times thereafter, the plaintiff was and is the owner in fee simple and entitled to the immediate possession of the property described in the complaint herein, to wit: NW $\frac{1}{4}$, Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, Alaska.

Dated at Fairbanks, Alaska, this 27th day of April, 1951.

/s/ ERNEST JOHNSON,

Foreman.

The Court: The jury is excused until 10 a.m. on the 2nd of May.

(At 2:55 p.m., the trial of this cause was concluded.)

United States of America,
Territory of Alaska—ss.

I, Charles Belida, Official Court Reporter for the above-named court, do hereby certify as follows, to wit:

That I attended all court proceedings had in the above-named cause and that I reported in shorthand all of the oral proceedings had in said cause;

That the preceding pages, numbered 1 through 106, both inclusive, constitute a full, true, complete and accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 7th day of May, 1951.

/s/ CHARLES BELIDA,
Official Court Reporter.

[Endorsed]: Filed June 7, 1951. [106]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings as per Designation of Record by Appellants in the above-entitled cause, viz.:

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1. Complaint in Ejectment	1
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4. Summons and Return	5

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28. Transcript of Proceedings at Trial (pages 1 to 106, inclusive).	

29. Brown Manila Envelope Containing Exhibits.

Witness my hand and the seal of the above-entitled Court, this 11th day of July, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of the District Court, Fourth Judicial Division,
Territory of Alaska.

[Endorsed]: No. 13013. United States Court of Appeals for the Ninth Circuit. Thomas Jones, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Judicial Division.

Filed July 16, 1951.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13013

THOMAS JONES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

The appellant states that the points upon which he intends to rely on this appeal are as follows:

1. That the Court erred in overruling objections at pages 13, 28, 29, 30, 31, 32, 37, 38, 40, 42, 43, 44, 46, 47, 48, and 96 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

2. That the Court erred in denying motions to strike testimony at pages 32, 60, 92 and 93 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

3. That the Court erred in denying offers to prove at pages 73, 74, 76, 77, 100 and 101 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

4. That the Court erred in denying the defendant Jones' Motions to File Amended Answer at pages 81, 87 and 97 of the Transcript of Trial as

numbered by the official Court Reporter of the District Court.

5. That the Court erred in granting plaintiff's Motion for Directed Verdict at page 104 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

/s/ WARREN A. TAYLOR,
Attorney for Appellant,
Thomas Jones.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

The appellant hereby designates, by reference to the pages of the original certified record, the following portions of said record which are material to the consideration of this appeal:

Complaint in EjectmentP. 1- 2
Answer of Defendant JonesP. 3
Answer of Defendant KellyP. 4
Lodged Amended Answer (Motion to file
same denied)P. 21-23
VerdictP. 23
JudgmentP. 24-25
Notice of AppealP. 31
Designation of RecordP. 34
Entire Reporter's Transcript of Trial.
All the Exhibits admitted in evidence at the trial
and the identifications offered.
Certificate of Clerk.

/s/ WARREN A. TAYLOR,
Attorney for Appellant,
Thomas Jones.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1951.



No. 13,013

IN THE

United States Court of Appeals
For the Ninth Circuit

THOMAS JONES,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

WARREN A. TAYLOR,

WILLIAM V. BOGGESS,

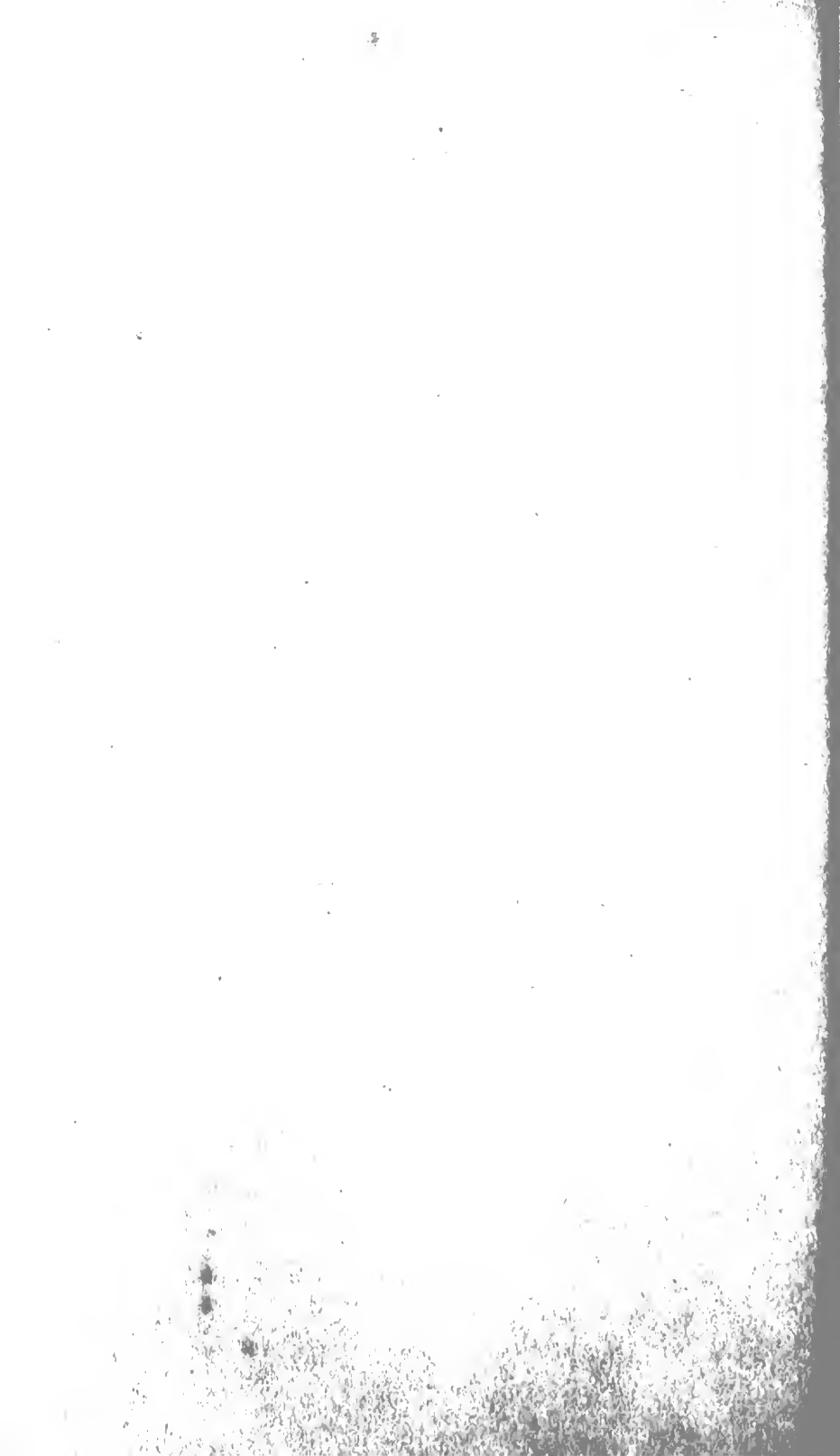
Fairbanks, Alaska,

Attorneys for Appellant.

FILED

DEC - 7 1951

PAUL P. O'BRIEN
CLERK



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No. 13,013

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THOMAS JONES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

The above-entitled action was instituted by the appellee in the District Court for the District of Alaska, Fourth Division, on the 9th day of January, 1951, in which action the appellee sought to recover possession, from the appellant and one Nell Kelly, certain lands situated within the Fourth Division, Territory of Alaska.

Separate answers were filed by the appellant and said Nell Kelly. The answer of appellant was filed on the 23rd day of February, 1951. On the 27th day of April, 1951, appellant served upon the United States Attorney, appellee's attorney, an amended answer, and lodged the same with the Clerk of the Dis-

trict Court, together with a motion for leave to file the same. The motion to file said amended answer was overruled by the Court and issues were joined upon the plaintiff's complaint and appellant's answer. A jury was empanelled and the testimony of the appellant and appellee was taken, and upon the conclusion of the taking of said testimony, the Court directed the jury to return a verdict in favor of the plaintiff, against appellant.

STATEMENT OF CASE.

The lands described in the appellee's complaint, the possession of which were sought to be recovered by appellee from appellant and the said Nell Kelly, were described in the complaint as follows:

NW $\frac{1}{4}$ of Section 34, Township 2 S., Range 3 E.,
Fairbanks Meridian,

which lands were embraced in a withdrawal order of Public Lands in Aid of Flood Control, which said executive order was issued December 3, 1938 and numbered 8020.

At the trial of the case, appellant offered to prove that he entered upon a portion of the above-described lands by virtue of a certain lease from the said Nell Kelly, who had entered upon the lands in 1943 under Homestead laws and who had made improvements upon the said lands. The appellant also offered to prove that he had made improvements on that portion of the lands hereinbefore described and that the

value of the improvements were approximately \$50,000.00. This offer of proof was denied by the Court.

**STATEMENT OF POINTS RELIED UPON
FOR REVERSAL.**

Appellant contends that the District Court erred in sustaining the motion of appellee for a directed verdict in its favor, upon the grounds that the appellee had failed to make out a *prima facie* case, in that they had failed to prove that at any time prior to 1949, had there been any section of land in the area of the Moose Creek Lodge, upon which were located the improvements of the appellant, designated as Section 34, Township 2 S., Range 3 E., Fairbanks Meridian, and, that up to the time of the trial of the said cause, no official map and plat of the said section had been made and filed in the Land Office at Fairbanks, Alaska.

Appellant further contends that the District Court erred in denying appellant's motion to file an amended answer in said cause (T.R. page 83).

Appellant further contends that the Court erred in overruling timely objections to the introduction of certain testimony offered by appellees (Pages 24, 28, 37, 38, 39, 40, 43, 44, 45, 53, 65 and 95).

ARGUMENT.

Taking the points relied upon for reversal, in the order in which they are stated, appellant contends that the evidence introduced in this case failed to make out a *prima facie* case which would justify the Court taking the case from the jury and directing the verdict for the appellee, upon the grounds that it had failed to prove that at the time Nell Kelly went upon the said lands in controversy that there existed any portion of the Public Domain designated as Section 34, Township 2 S., Range 3 E., Fairbanks Meridian.

The appellee attempted to show by Plaintiff's Exhibit "A" that certain lands had been withdrawn from Entry for Flood Control purposes, among which lands was designated Section 34, Township 2 S., Range 3 E., Fairbanks Meridian.

That upon the trial of the cause, the appellee failed to introduce any official map and plat of said section. That being aware of the lack of satisfactory evidence with which to prove the case, the United States Attorney moved that a recess be taken for a period of two days, to allow the appellee to send into the field a group of surveyors, the leader of which, Robert E. Lyle, later testified that he had run a course from the Northwest Corner of Section 9, Township 2 S., Range 3 E., Fairbanks Meridian, to a corner designated as a Witness Corner to the Northwest Corner of Section 34.

Upon cross-examination by appellant's attorney, witness Lyle testified that he had found this corner

and that the same had been established in 1949, and seven years after Nell Kelly, one of the defendants in said case, had entered upon the premises described in appellee's complaint, and which she later established as Moose Creek Lodge.

At the trial of the cause, appellant offered to prove that Nell Kelly had been placed upon the said lands by the United States Bureau of Land Management at a time when no surveys were available to indicate the boundaries of said section. That the said Nell Kelly had previously filed an application for a Homestead approximately three miles north of the Section 34, hereinabove referred to. That she was informed by the Bureau of Land Management that the land upon which she had filed her Location Notice was in the Flood Control area and would be unsuitable for the purpose of homesteading, and advised her that the SE $\frac{1}{4}$ of Section 27, Township 2 S., Range 3 E., Fairbanks Meridian, was open for location and entry, and that the supposed boundary of the said quarter-section was pointed out to her by the Director of the Bureau of Land Management at Fairbanks, Alaska, in 1943. That she entered upon the occupied lands under said entry until 1946, when she leased a portion of said lands upon which her improvements were placed, to one William Fitzinger, who later assigned the lease to appellant Thomas Jones. That upon the expiration of that lease, in 1948, she executed a lease of the said premises to Thomas Jones, for a period of five years, with option to renew for an

additional five years, and that pursuant to said lease, appellant made improvements thereon of the approximate value of \$50,000.00 (Testimony of Thomas Jones, T.R. pages 96 to 100, inclusive). This offered proof was refused by the Court upon the grounds that no damages were asked by the plaintiff from appellant Jones for withholding the said lands described in the complaint, and of which he was occupying approximately ten acres.

It is true that no damages were asked in appellee's complaint, but any damages that might have been recovered by appellee's prayer for such, were far outweighed by the actual damages which would ensue to the appellant by losing the investment of the value of \$50,000.00, which he had invested thereon.

Furthermore, the plaintiff failed to allege and prove that demand had been made on the appellant that he vacate the premises known as Moose Creek Lodge. Demand was a prerequisite to instituting suit against appellant. 28 *Corpus Juris Secundum*, Section 27, page 882, states:

"Such Notice or Demand is required where Defendant has entered and holds possession, that he cannot be treated as a trespasser, as where he is in possession under a contract right * * *".

In the present instance Nell Kelly made a lawful entry upon the said lands with the consent and approval of the Bureau of Land Management, who indicated her lands, which the local Director believed to be open for Location.

Under the above, Nell Kelly was not a trespasser, nor was appellant Jones, and demand for the vacation of the said premises was necessary.

Appellant also offered to introduce in evidence, the lease from Nell Kelly to appellant, which offer was refused by the Court and constituted manifest error.

Fred Weiler, Manager of the Bureau of Land Management at Fairbanks, Alaska, testified that Nell Kelly had entered upon the said lands in 1942; that she claimed ownership of Moose Creek Lodge; that the lands were unsurveyed; and that she had erected on said land, a building 30 x 20 feet, and later added to said building.

Upon the offer to prove, by the said Fred Weiler, material allegations necessary to substantiate the allegations of the said complaint, the United States Attorney requested additional time in which to send surveyors to establish the boundaries of Section 34, Township 2 S., Range 3 E., Fairbanks Meridian, and to establish the fact that Moose Creek Lodge was in said Section, and the Court acceded to the request of the United States Attorney and postponed further proceedings until the second day following the recess (T.R. page 32).

That the only evidence regarding the boundaries of Section 34, Township 2 S., Range 3 E., Fairbanks Meridian, is testified to by Robert E. Lyle, plaintiff's witness, and was obtained during the recess above mentioned, and in that particular part of his testimony, the witness did point out that he

found no indication of any survey being made prior to the year 1949, and at no time did he find any corner of said Section 34. It is evident from that testimony that Nell Kelly and appellant were on Section 34 and such fact was not verified until after the beginning of the trial in the District Court. That at the time of filing the complaint in the above action United States Attorney had no factual knowledge as pleaded in said complaint. Furthermore, no evidence was offered that Nell Kelly was unlawfully on said lands in dispute, in fact, the contrary appears from the testimony of Fred Weiler, Manager of the Bureau of Land Management.

No evidence was offered that the said lands were located in the area designated as Flood Control Lands, although the executive order withdrawing certain lands for Flood Control was introduced in evidence, Plaintiff's Exhibit "A". In this connection, it is difficult to understand how such a withdrawal order could affect a nonexistent section of land or a part thereof.

It is further contended that the failure of the appellee to introduce in evidence an official survey of the lands described in plaintiff's complaint, would constitute a failure to prove the material allegations of the complaint, and that the Court erred in directing the verdict in favor of the appellee where there had been such a fatal failure to prove a material fact contending to show that there was such a section as described in the complaint and that the said appellant and Nell Kelly were unlawfully upon the said lands.

The rules of equity should apply in this case, to the same degree to the Government as to a private individual or corporation under like circumstances.

In the present instance, the Bureau of Land Management has removed Nell Kelly from certain lands which she had entered upon, for the reason that the same would be in the Flood Control Area and unsuitable for cultivation, pointed out to her lands which were open for entry and location, and that agents of the United States Bureau of Land Management had stood idly by while she had placed improvement upon the said grounds, and while the lessee, Thomas Jones, occupied the said grounds for a period of five years and allowed him to make further improvement to the premises, and then, without demand or notice, to bring an action, eight or nine years after the original entry upon the said land, to eject the said parties from the land in question and confiscate the improvements, which had been made in good faith and in reliance upon the fact that the lands had been entered upon lawfully by the parties.

Appellant respectfully contends that, in view of the foregoing fact, this Honorable Court of Appeals should issue its mandate to the District Court for the Territory of Alaska, Fourth Division, to enter a verdict in favor of the appellant, or, in the alternative, that the said cause be reversed and remanded for a new trial, with instructions to the said Court to allow the appellant to introduce in evidence the lease between himself and Nell Kelly and to prove at a retrial of the

said cause, all the matters offered in evidence by the appellant at the trial of the case.

The Court may take cognizance of the fact that no authorities are cited herein. That appellant feels that the matters involved herein are so elementary that no citation of authorities is requisite or necessary.

Dated, Fairbanks, Alaska,

December 7, 1951.

Respectfully submitted,

WARREN A. TAYLOR,

WILLIAM V. BOGGESE,

Attorneys for Appellant.

No. 13013

**In the United States Court of Appeals
for the Ninth Circuit**

THOMAS JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY
OF ALASKA, FOURTH JUDICIAL DIVISION**

BRIEF FOR THE UNITED STATES

WM. AMORY UNDERHILL,

Assistant Attorney General.

EVERETT W. HEPP,

*United States Attorney,
Fairbanks, Alaska.*

ROGER P. MARQUIS,

ELIZABETH DUDLEY,

*Attorneys, Department of Justice,
Washington, D. C.*

FILED

JAN - 9 1952

PAUL P. O'BRIEN

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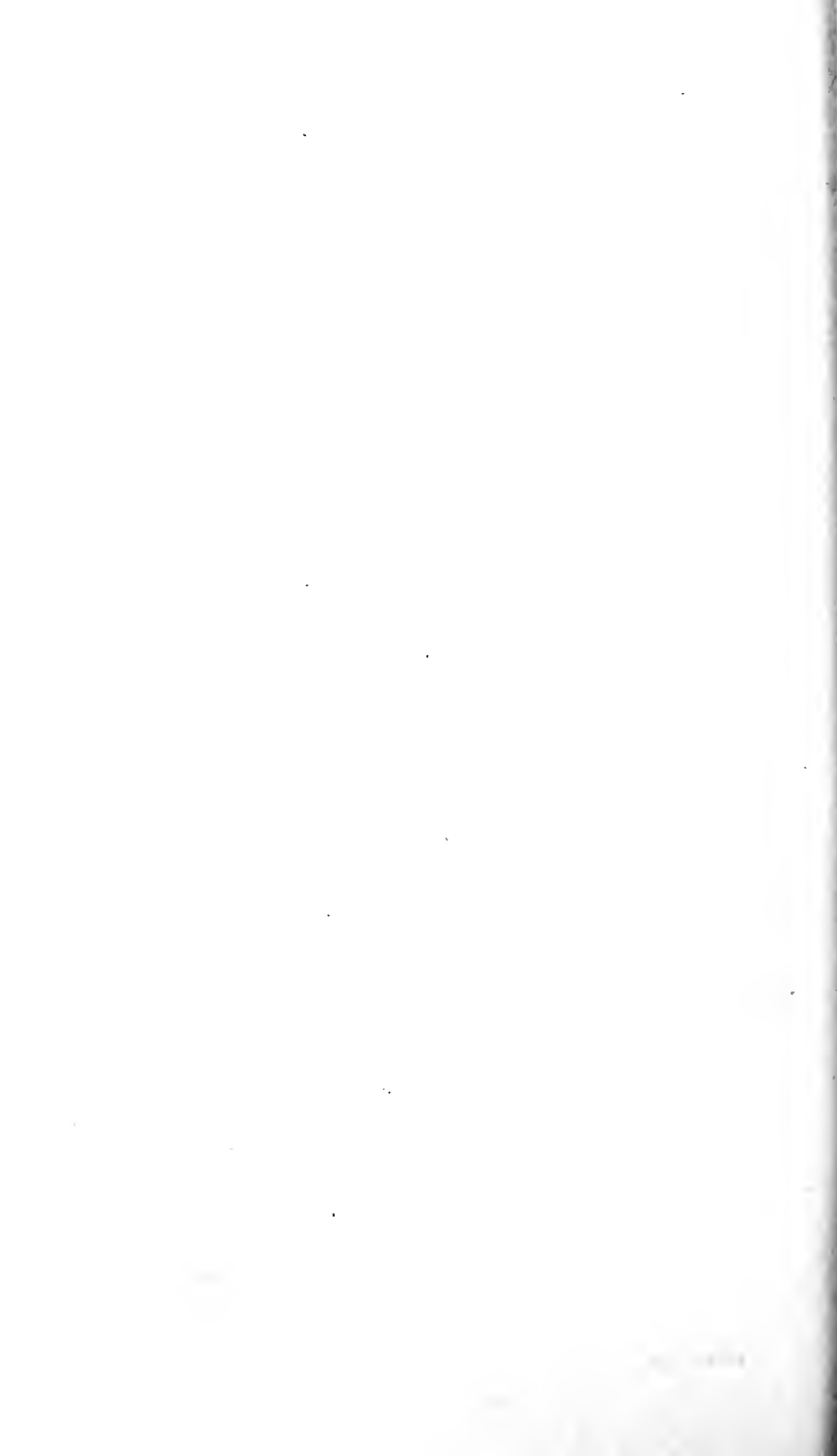
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In the United States Court of Appeals for the Ninth Circuit

No. 13013

THOMAS JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY
OF ALASKA, FOURTH JUDICIAL DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment entered April 27, 1951, awarding the United States possession of certain property (R. 10-11). Notice of appeal was filed June 5, 1951 (R. 11-12). The jurisdiction of the district court was invoked under 28 U. S. C. sec. 1345, and the jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether the evidence presented was such that reasonable men could not differ as to the fact that the

property involved is located in Section 34, Township 2 South, Range 3 East, Fairbanks Meridian.

STATEMENT

On January 9, 1951, the United States filed a complaint in ejectment against Nell Kelly and Thomas Jones, seeking the immediate possession of the NW $\frac{1}{4}$ Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, containing 160 acres together with the improvements thereon. The complaint alleges that the United States is now, and for more than fifty years has been, the owner in fee simple of said lands, which are embraced within a Withdrawal of Public Land in Aid of Flood Control, Alaska, by Executive Order No. 8020, dated December 2, 1938¹ (R. 3-4). Separate answers denying the allegations of the complaint were filed (R. 4-5, 5-6).²

Trial proceedings were had before the court and a jury, beginning on April 23, 1951. The Government's first witness, Fred J. Weiler, Manager of the Land Office, Bureau of Land Management, Department of the Interior, Fairbanks, testified that in 1943 Mrs. Nell Kelly erected a dwelling 30 by 20 feet, and later made an addition to the building, which

¹ This Order was introduced in evidence and marked as Plaintiff's Exhibit "A" (R. 17-18). The printed record omitted the range number in line 9, page 18. It should read: "T. 2 So., R. 3 E., secs. 19 and 28 to 34, inclusive (unsurveyed)." 3 C. F. R., 1943 Cum. Supp. p. 437.

² The defendant Jones sought to file an amended answer showing that he entered upon the land under the terms of a lease from Nell Kelly, and that he expended approximately \$50,000 in improvements on the property. The court refused to allow the filing of the answer because it stated no defense (R. 6-8, 82-83, 96-97).

is now known as Moose Creek Lodge, on the land in question; that some time later she filed an application for this tract of land; and that in March 1948, Robert H. Casperson filed an application to contest Mrs. Kelly's claim, describing the land as the unsurveyed SW $\frac{1}{4}$ Section 27, Township 2 South, Range 3 East of the Fairbanks Meridian (R. 19-23). Mr. Weiler stated that Section 27 is immediately north of Section 34. The Government sought to prove the location of the land involved by a plat dated February 6, 1951, showing Section 34, Township 2 South, Range 3 East of the Fairbanks Meridian, and the location of the Moose Creek Lodge development as related to the preliminary field survey of Section 34. The appellant³ objected to admission of this instrument on the ground that it was a sketch, not a survey, and that it was not an original nor had it been certified to be true and correct. The court sustained the objection and held that the plat would have to be proved by the surveyors who compiled it, by showing their field notes and testifying that they made the map pursuant thereto (R. 24-28). As the surveyor who made the plat was not available, the trial was interrupted while the Government had a survey made of the premises of Moose Creek Lodge showing its location according to meridian, township, range and section (R. 28-33,

³ The attorney for the defendant Kelly took the most active part in the trial and made most of the objections, but since there was no conflict between the positions of the two defendants, and Mrs. Kelly is not appealing, "appellant" is used herein even though certain motions or objections were made by the attorney for Mrs. Kelly.

42). This survey was made by Robert Lyle, of the Corps of Engineers, stationed at Ladd Field. He testified that he located Moose Creek Lodge by using as a starting point an iron post of the General Land Office, which marks the northeast corner of Section 9, Township 3 South, Range 3 East.⁴ From this point he made measurements and observations and located a witness corner in Township 2 South, Range 3 East, Sections 28, 27, 33 and 34. From this corner he established the north and west lines of Section 34, and found Moose Creek Lodge to be a distance of 1181.70 feet south from the section line, and 812.86 feet from the west boundary line, thereby locating it well within the NW $\frac{1}{4}$ of Section 34 (R. 42-54).

The appellant objected to Mr. Lyle's testimony, and sought to prove the inaccuracy of his measurements by a plat which showed Moose Creek Lodge to be in a slightly different location within Section 34. The Government's objection to this plat was sustained, as it developed that this was the identical plat dated February 6, 1951, which the court had refused to admit as evidence on the objection of the appellant. The court examined the plat and found that the lodge was shown to be in Section 34, the section alleged in the pleadings, and stated that it was immaterial that it showed a different number of feet from one side or the other (R. 68-75). Appellant's attorney stated to the court

⁴ The official plat of survey of Township 3 South, Range 3 East, Fairbanks Meridian, was introduced in evidence and marked as plaintiff's Exhibit "B" (R. 34-38).

that Mr. Weiler, whom he had made his witness, had advised him that the only map in his office disclosed that the property in question is in fact in Section 34 (R. 82).

The court refused to admit in evidence a lease from Nell Kelly to the appellant, by which he sought to show that he had spent in excess of \$50,000 in improvements (R. 96-100).

The Government's motion for a directed verdict was granted (R. 102-103), and a judgment was entered on the jury verdict awarding immediate possession to the Government (R. 10-11). This appeal followed (R. 11-12).

ARGUMENT

The court properly directed a verdict in view of the evidence in this case

It is well settled that if the evidence in a case is "so overwhelmingly on one side as to leave no room to doubt what the fact is" the court may properly direct a verdict. *Gunning v. Cooley*, 281 U. S. 90, 94 (1930); *Brayer v. John Hancock Mut. Life Ins. Co.*, 179 F. 2d 925, 928 (C. A. 2, 1950); *United States v. Grannis*, 172 F. 2d 507, 513 (C. A. 4, 1949), certiorari denied 337 U. S. 918. Such is the evidence here.

A. *There is no question that the lodge was in Section 34.*—The Government's evidence as to the location of Moose Creek Lodge was uncontradicted. Although appellant attempted to prove that the lodge might be located a different number of feet from the section lines from that testified to by the engineer

who made the survey of the land ⁵ (R. 68-76), it was finally conceded that the only map in the office of the Bureau of Land Management showed that it was in fact in Section 34, Township 2 South, Range 3 East, Fairbanks Meridian (R. 82). Appellant further concedes (Br. 8) that Nell Kelly and the appellant were on Section 34. The record reveals no evidence that the lodge was not located in Section 34.

Section 34, Township 2 South, Range 3 East, Fairbanks Meridian was not open to settlement at the time Mrs. Kelly entered the ground in 1943 (R. 23), having been withdrawn in aid of flood control by Executive Order No. 8020 in 1938 (R. 17-18). The fact much emphasized by appellant that Mrs. Kelly thought her claim was on the SW $\frac{1}{4}$ of Section 27, Township 2 South, Range 3 East, Fairbanks Meridian (R. 7, 22), gives her no vested right in Section 34 as against the United States. Although her claim was initiated by actual settlement on the ground and notice of that settlement was recorded in the United States Commissioner's office (R. 23), there is nothing in the record to show that she had paid for the land and obtained a receipt from the proper land officer for the purchase price, which would have been necessary to obtain a vested right, if the section were open for settlement. "Until this has been done it is competent

⁵ Mr. Lyle stated that as a result of his measurements and computations, the northwest corner of Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, is within the limit of about one in five thousand feet, so that if his computations were incorrect to that extent, Moose Creek Lodge would still be about 1,100 feet south of the boundary line of Section 34 (R. 63-64).

for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler.”⁶ *Russian-American Co. v. United States*, 199 U. S. 570, 577–578 (1905); see also *Utah Power & Light Co. v. United States*, 243 U. S. 389 (1917). Appellant’s argument that Nell Kelly made a lawful entry upon the land with the consent and approval of the Bureau of Land Management (Br. 6)⁷, hence was not a trespasser, is without merit. “As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. * * * A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it.” *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409 (1917). See also *United States v. San Francisco*, 310 U. S. 16, 31–32 (1940); *United States v. California*, 332 U. S. 19, 39–40 (1947); *Federal Crop Ins. Corp. v. Merrill*,

⁶ Public Land Order 577, March 29, 1949, 43 C. F. R., 1950 Supp., 150, is an order withdrawing public lands for use of Department of the Air Force as an air force base. Section 34, Township 2 South, Range 3 East (unsurveyed), Fairbanks Meridian, was included in the withdrawal order, subject to Executive Order No. 8020.

⁷ If appellant’s lessor, Mrs. Kelly, was advised that the SE $\frac{1}{4}$ of Section 27, Township 2 South, Range 3 East, Fairbanks Meridian, was open for location, as contended in the brief (p. 5), her location as she believed in the SW $\frac{1}{4}$ of such section was without the consent and approval of the Bureau of Land Management.

332 U. S. 380, 384 (1947). Thus, the evidence is uncontradicted that Moose Creek Lodge was located in Section 34, and that that section had been validly withdrawn from entry in 1938. On these facts the court had no alternative but to direct a verdict for the United States.

B. Other considerations relied upon by appellant are irrelevant and present no defense to the action.—Appellant's argument that demand to vacate the premises was a prerequisite to instituting suit against him (Br. 6) must fail. No demand was necessary, and the filing of the complaint in ejectment was sufficient notice. No relationship of landlord and tenant existed between the United States and appellant, nor was the lessor in the lease under which he occupied the premises in privity of title with the United States. Moreover, this defense comes too late, having been made for the first time in the brief in this Court. Appellant, "therefore, waived all defenses which he did not present by motion or answer, except failure to state a cause of action or lack of jurisdiction of the subject matter." *Carter v. Powell*, 104 F. 2d 428, 430 (C. A. 5, 1939), certiorari denied 308 U. S. 611; *E. I. Du Pont De Nemours & Co. v. Martin*, 174 F. 2d 602, 605 (C. A. 6, 1949); Rule 12 (h), Federal Rules of Civil Procedure.

Appellant was not prejudiced by the court's denial of his motion to file an amended answer, as contended (Br. 3). The answer (R. 6–8) shows the property to be located in Section 27, but that cannot be construed as evidence of its real location, particularly when the answer states that the lease under which appellant

occupies the property erroneously described it as being located in Section 20. The amount alleged to have been expended for improvements was irrelevant to any issue before the court, since no damages were sought in this action, but merely possession of the property.

Appellant fails to point out in what respect the court erred in overruling objections to the introduction of certain testimony offered by appellee (Br. 3), but an examination of the record discloses that no prejudicial error was committed thereby.

CONCLUSION

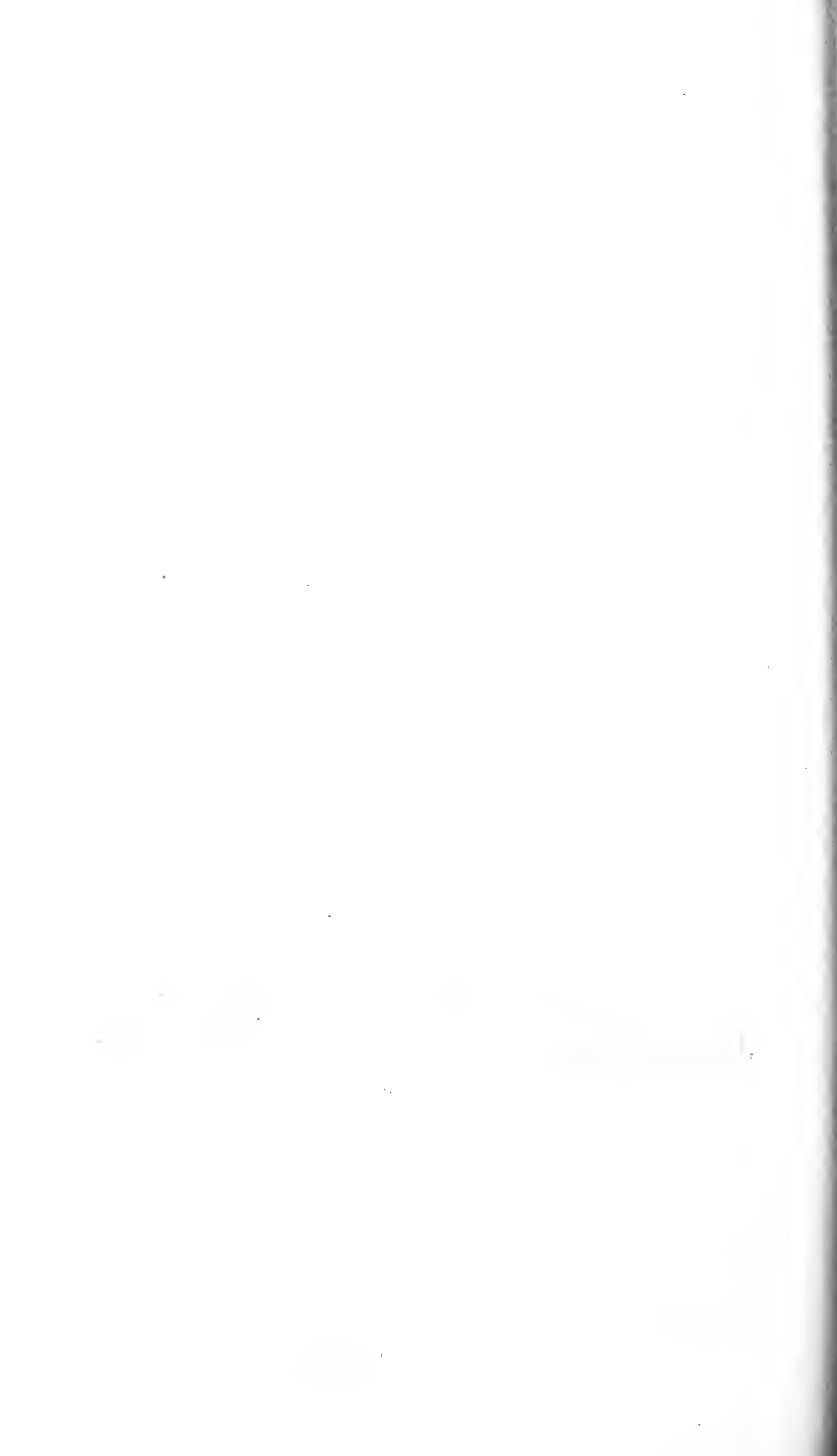
For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

WM. AMORY UNDERHILL,
Assistant Attorney General.

EVERETT W. HEPP,
*United States Attorney,
Fairbanks, Alaska.*

ROGER P. MARQUIS,
ELIZABETH DUDLEY,
*Attorneys, Department of Justice,
Washington, D. C.*

JANUARY 1952.



No. 13014

United States
Court of Appeals
For the Ninth Circuit.

HENRY T. TANIMURA,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED

SEP 7 1951

PAUL E. O'BRIEN
CLERK



No. 13014

United States
Court of Appeals
For the Ninth Circuit.

HENRY T. TANIMURA,

Appellant.

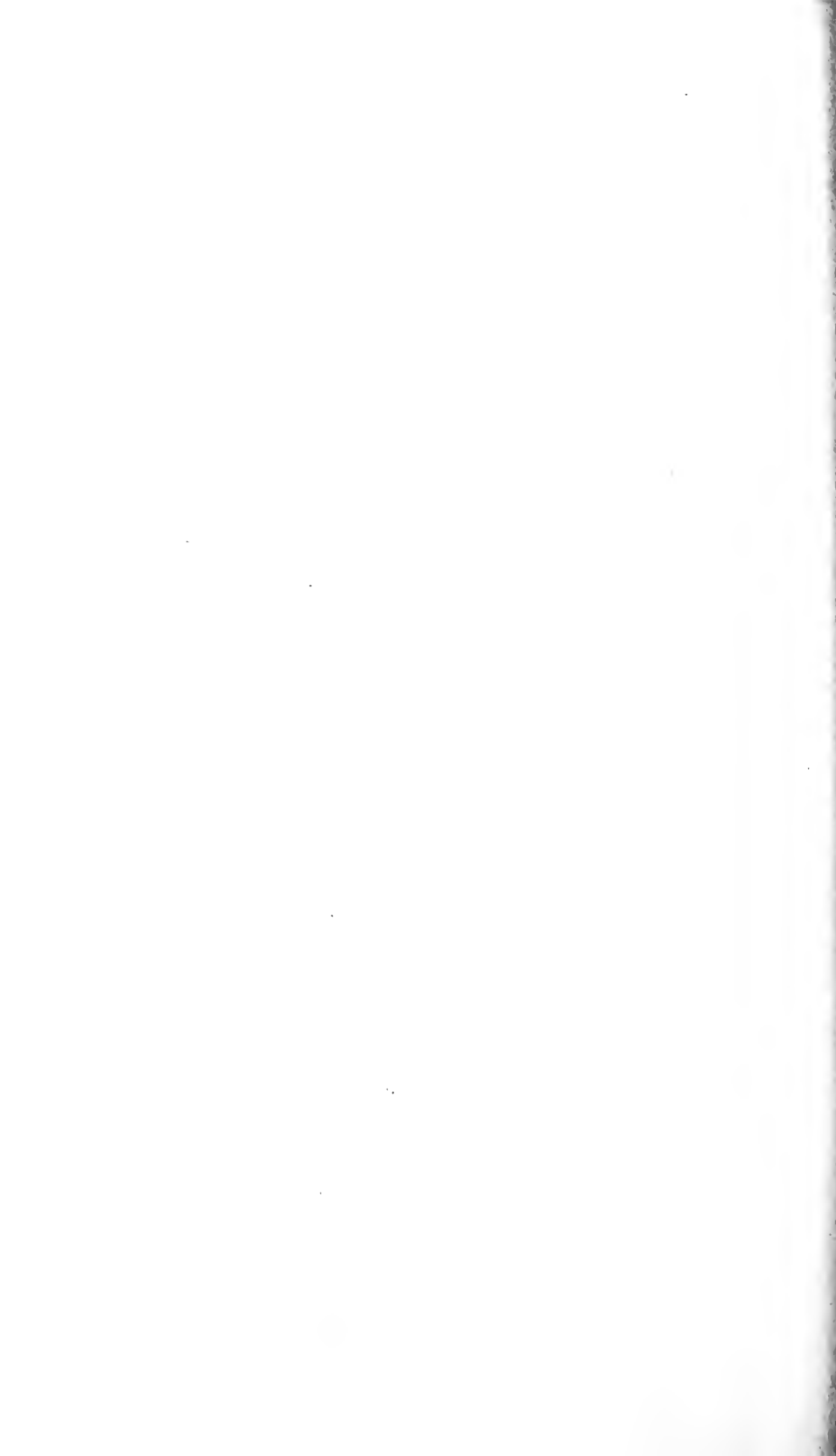
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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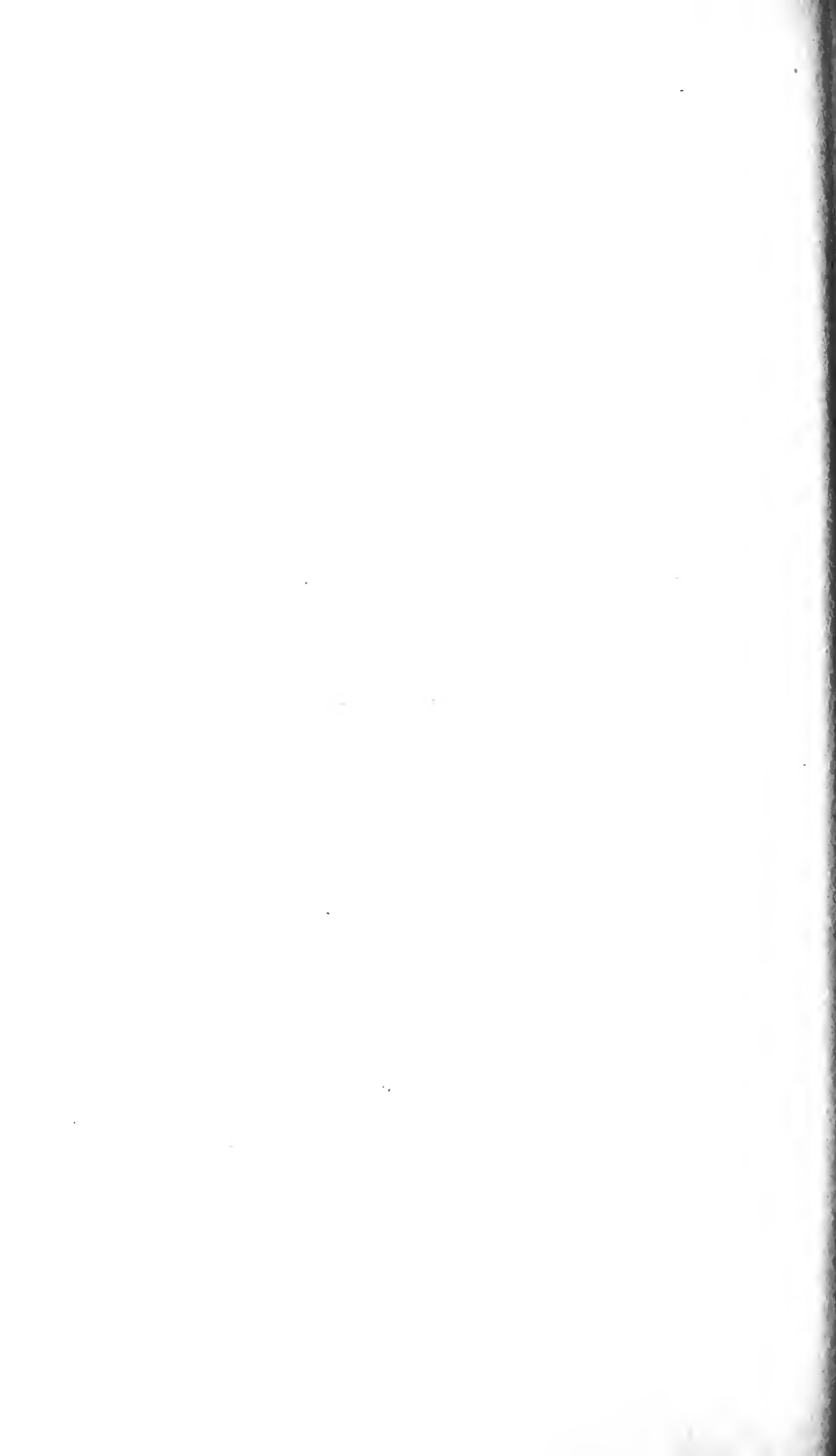
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Attorneys for Defendant and Appellant.

SIDNEY FEINBERG,
WILLIAM B. SPOHN,

Attorneys for Plaintiff and Appellee.



United States District Court for the Northern
District of California, Southern Division

No. 29527

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY T. TANIMURA, CHARLES S. LEE, and
CAROL W. LEE,

Defendants.

COMPLAINT FOR INJUNCTION, RESTI-
TUTION AND TREBLE DAMAGES

Count I.

1. In the judgment of the Housing Expediter, the defendants have engaged in acts and practices which constitute violations of Section 4 of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. Appendix Section 904).

2. Jurisdiction of this action is conferred upon this Court by Sections 1(b), 205(a) and 205(c) of said Emergency Price Control Act of 1942, as amended.

3. At all times mentioned herein defendants were the landlords of and rented certain controlled housing accommodations located within the San Francisco Bay Defense-Rental Area, described as No. 1550 Fillmore Street, in the City and County of San Francisco, California.

4. Prior to July 1, 1947, there has been in full

force and effect pursuant to said Emergency Price Control Act of 1942, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in paragraph 3 of Count I above are located.

5. Prior to July 1, 1947, defendants demanded, accepted or received from tenants occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Items 1(a) through 1(h) of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Prior to July 1, 1947, defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises, rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

Count II.

1. Plaintiff incorporates herein by reference the allegations in Paragraph 3 of Count I of his Complaint herein.

2. In the judgment of the Housing Expediter, the defendants have engaged in acts and practices which constitute violation of Section 206(a) of the

Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. 1881-1906; Public Law 31, 81st Congress, 1st Session).

3. Jurisdiction of this action is conferred upon this Court by Sections 206(b) and 206(c) of said Housing and Rent Act of 1947, as amended.

4. Since July 1, 1947, there has been in full force and effect pursuant to said Housing and Rent Act of 1947, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in Paragraph 3 of Count I above are located.

5. Since July 1, 1947, defendant demanded, accepted or received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Items 2(a) through 2(s) of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Since July 1, 1947, defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

Count III.

1. Plaintiff incorporates herein by reference the allegations in Paragraph 3 of Count I and Paragraph 4 of Count II of his Complaint herein.

2. Jurisdiction of this action is conferred upon this Court by Sections 205 and 206(c) of said Housing and Rent Act of 1947, as amended.

3. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) day period immediately prior to the date of the commencement of this action) to wit: between March 1, 1949, and January 15, 1950, defendants demanded, accepted or received from tenants occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations as appears more fully in Items 3(a) through 3(m) inclusive, of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

4. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) day period immediately prior to the date of the commencement of this action) defendants have demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

5. More than thirty (30) days have elapsed since the occurrence of the violations hereinabove mentioned, and the persons from whom such excess rental payments were demanded, accepted or received have not instituted any action under Section 205 of the Housing and Rent Act of 1947, as amended for said violations.

Wherefore, the Plaintiff demands and prays:

1. That an injunction be issued enjoining the defendants, their attorneys, agents, employees and servants and all other persons in active concert or participation with the defendants from directly or indirectly demanding, accepting or receiving rents in excess of the maximum rents established by any Regulation or Order heretofore or hereafter adopted, pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in acts and practices which constitute or will constitute a violation of any of the provisions of the Housing and Rent Act of 1947, as amended, or extended or superseded, or of the Rent Regulations issued pursuant thereto.

2. That the defendant be ordered and directed to pay to the Treasurer of the United States, for and on behalf of all persons entitled thereto, a refund of all amounts (the amount presently ascertained by the Plaintiff being the sum of Five Thousand Sixty-six and 49/100 Dollars (\$5,066.49) in excess of the lawful maximum rents which have been or

may be demanded, accepted or received by the defendants from any tenants for or in connection with the use or occupancy of the housing accommodations hereinbefore mentioned; or, in the alternative, that the defendants be ordered and directed to pay the amounts in excess of the lawful maximum rents as hereinabove prayed, to the Treasurer of the United States.

3. That judgment for the Plaintiff be granted herein for Four Thousand Nine Hundred Seventy and 25/100 Dollars (\$4,970.25), being three times the amount by which the rents demanded, accepted or received by the defendants within one year prior to the date of the commencement of this action, excluding, however, the thirty (30) days immediately prior to the date of the commencement of this action, exceeded the legal maximum rent.

4. That such other, different or further relief to which Plaintiff may be entitled be granted, or other relief be accorded which the Court may find necessary to effectuate the purposes of the said Act as now existing, or as hereafter amended or superseded, and of any orders or regulations issued thereunder.

5. That Plaintiff recover the costs of this action.

Dated this 24th day of February, 1950.

/s/ RAYMOND J. FOX,

Attorney for Plaintiff, Office
of Housing Expediter.

EXHIBIT A

Henry T. Tanimura and Charles S. Lee and Carol W. Lee
1550 Fillmore St., San Francisco, California

SCHEDULE

Tenant	Unit	Date Rented	Rent Collected	Maximum Legal Rent (\$4.50 per Wk or \$19.50 Mo.)	Number of Over- Charges	Amount of Each Overcharge	Overcharge to Each Tenant	Amount Subject to Treble Damages
1(a) Frank T. Hara.....	Apt. 305 1550 Fillmore St. San Francisco, Calif.	4/23/47 to 6/30/47	\$40 per Mo.	\$4.50 per Wk (or \$19.50 Mo.)	21 1/2	\$20.50	\$46.12	.....
1(b) Frank T. Hara.....	Apt. 305 1550 Fillmore St. San Francisco, Calif.	Bonus demanded as condition precedent to renting apartment					\$100.00	\$100.00
1(c) Robert Kiyota	Apt. 306 1550 Fillmore St. San Francisco, Calif.	5/10/47 to 6/30/47	\$10.00 per Wk	\$6.50 per Wk	7	\$ 3.50	\$ 24.50	.....
1(d) George Komatsu	Apt. 309 1550 Fillmore St. San Francisco, Calif.	2/ 3 47 to 6/30 47	\$40.00 per Mo	\$19.50 per Mo.	5	\$ 20.50	\$102.50	.....
1(e) Grace Miyamoto	Apt. 409 1550 Fillmore St. San Francisco, Calif.	12 8/46 to 6/30/47	\$10.00 per Wk	\$22.50 per Mo. (or \$5.25 Wk.)	16	\$ 4.75	\$ 76.00	.....
1(f) Lillian Hiraike	Apt. 407 1550 Fillmore St. San Francisco, Calif.	2 8 47 to 6/30/47	\$40.00 per Mo	\$5.50 per Wk (or \$24.00 Mo.)	4 1/2	\$ 16.00	\$ 75.00	.....
1(g) Mrs. Harumi Kameda	Apt. 503 1550 Fillmore St. San Francisco, Calif.	12/ 4/46 to 6/30 47	\$50 per Mo.	\$10.00 per Mo	7	\$ 10.00	\$ 70.00	.....
1(h) Mrs. Harumi Kameda	Apt. 503 1550 Fillmore St. San Francisco, Calif.	Bonus demanded as condition precedent to renting apartment					\$250.00	\$250.00
2(a) Frank T. Hara	Apt. 305 1550 Fillmore St. San Francisco, Calif.	7/ 1 47 to 9 23 47	\$40.00 per Mo	\$4.50 per Wk (or \$19.50 Mo.)	29 1/2	\$ 20.50	\$ 56.37	.....
2(b) Sam Sakada	Apt. 305 1550 Fillmore St. San Francisco, Calif.	3 15/48 to 12/24 49	\$10.00 per Wk	\$4.50 per Wk	92	\$ 5.50	\$506.00	.....
2(e) Robert Kiyoti	Apt. 306 1550 Fillmore St. San Francisco, Calif.	7 1 47 to 2 28/49	\$10.00 per Wk	\$6.50 per Wk	86	\$ 3.50	\$301.00	.....
2(d) Chas. Masada	Apt. 306 1550 Fillmore St. San Francisco, Calif.	4 6/49 to 12/ 6 49	\$45.00 per Mo	\$6.50 per Wk (or \$28.00 Mo.)	8	\$ 17.00	\$136.00	.....
(e) Geo K. Komatsu	Apt. 309 1550 Fillmore St. San Francisco, Calif.	7 1 47 to 1 1 49	\$40.00 per Mo	\$19.50 per Mo	18	\$ 20.50	\$309.00	.....
(f) Kazutami Tani	Apt. 301 1550 Fillmore St. S F	2 12/49 to 9/ 9 49	\$48.00 per Mo	\$7.50 per Wk (or \$32.00 Mo.)	7	\$ 16.00	\$112.00	.....
(g) Marian Tani	Apt. 301 1550 Fillmore St. S F	9 9 49 to 12 17 49	\$45.00 per Mo	\$7.50 per Wk (or \$32.00 Mo.)	31 1/2	\$ 13.00	\$ 42.00	.....
(h) Grace Miyamoto	Apt. 409 1550 Fillmore St. S F	7 1 47 to 4 23 48	\$10.00 per Wk (or \$42.00 Mo.)	\$22.50 per Mo	92 1/2	\$ 19.50	\$188.50	.....
(i) Henry Yoshida	Apt. 403 1550 Fillmore St. S F	8 8 49 to 12 8 49	\$42.50 per Mo	\$37.50 per Mo	4	\$ 5.00	\$ 20.00	.....
(j) Suyuki Yemura	Apt. 404 1550 Fillmore St. S F	2 12 48 to 1 12 50	\$45.00 per Mo	\$22.50 per Mo	23	\$ 22.50	\$517.50	.....
(k) Rae Gordon	Apt. 406 1550 Fillmore San Francisco, Calif.	4 1 49 to 1 1 50	\$25.00 per Mo	\$21.00 per Mo	9	\$ 4.00	\$ 36.00	.....
2-1 Lillian Hiraike	Apt. 407 1550 Fillmore St. S F	7 1 47 to 10/ 7 48	\$40.00 per Mo	\$5.50 per Wk (or \$24.00 Mo.)	15 1/2	\$ 16.00	\$244.00	.....
2-2 Akio Yoshikawa	Apt. 401 1550 Fillmore St. S F	11 25 48 to 12 25 49	\$48.00 per Mo	\$7.50 per Wk (or \$32.00 Mo.)	13	\$ 16.00	\$208.00	.....
2-3 Jane Hiwano	Apt. 505 1550 Fillmore S F	1 28 48 to 12 28 49	\$45.00 per Mo	\$7.00 per Wk (or \$30.00 Mo.)	11	\$ 15.00	\$165.00	.....
2-4 Joe R. Kalsel	Apt. 507 1550 Fillmore S F	11 24 49 to 12 24 49	\$45.00 per Mo	\$6.50 per Wk (or \$28.00 per Mo)	1	\$ 17.00	\$ 17.00	.....
2-5 F. J. Nomura	Apt. 510 1550 Fillmore S F	9 1 47 to 6 30 48	\$57.00 per Mo	\$37.50 per Mo	19	\$ 19.50	\$195.00	.....
2-6 Douglas Tate	Apt. 510 1550 Fillmore St. S F	7 1 48 to 1 1 50	\$58.00 per Mo	\$37.50 per Mo	18	\$ 20.50	\$369.00	.....
2-7 George Boda	Apt. 511 1550 Fillmore St. S F	5 15 48 to 1 15 50	\$48.00 per Mo	\$22.50 per Mo	29	\$ 25.50	\$510.00	.....
2-8 Winifred Kay Miyano Tani	Apt. 512 1550 Fillmore St. S F	11 6 47 to 9 5 48	\$47.00 per Mo	\$7.00 per Wk (or \$30.00 Mo.)	22	\$ 15.00	\$330.00	.....
2-9 Sam Sakada	Apt. 305 1550 Fillmore St. S F	3 1 49 to 12 24 49	\$10.00 per Wk	\$4.50 per Wk	42	\$ 5.50	\$231.00	.....
2-10 Chas. Masada	Apt. 306 1550 Fillmore St. S F	4 6 49 to 12 6 49	\$45.00 per Mo	\$6.50 per Wk (or \$28.00 per Mo)	8	\$ 17.00	\$136.00	.....
2-11 Kiyoti Kiyota	Apt. 306 1550 Fillmore St. S F	3 1 49 to 7 1 49	\$48.00 per Mo	\$7.50 per Wk (or \$32.00 Mo.)	6	\$ 16.00	\$ 96.00	.....
2-12 Marian Tani	Apt. 301 1550 Fillmore St. S F	9 9 49 to 12 9 49	\$45.00 per Mo	\$7.50 per Wk (or \$32.00 Mo.)	31	\$ 11.00	\$ 39.00	.....
2-13 Henry Yoshida	Apt. 403 1550 Fillmore St. S F	8 8 49 to 12 8 49	\$42.50 per Mo	\$37.50 per Mo	4	\$ 5.00	\$ 20.00	.....
2-14 Suyuki Yemura	Apt. 404 1550 Fillmore St. S F	2 1 49 to 1 1 50	\$45.00 per Mo	\$22.50 per Mo	10	\$ 22.50	\$225.00	.....
2-15 Rae Gordon	Apt. 406 1550 Fillmore St. S F	4 1 49 to 1 1 50	\$25.00 per Mo	\$21.00 per Mo	9	\$ 4.00	\$ 36.00	.....
2-16 Akio Yoshikawa	Apt. 501 1550 Fillmore St. S F	7 1 49 to 12 1 49	\$48.00 per Mo	\$7.50 per Wk (or \$32.00 Mo.)	9	\$ 16.00	\$144.00	.....
2-17 F. J. Nomura	Apt. 510 1550 Fillmore St. S F	9 1 49 to 12 28 49	\$57.00 per Mo	\$37.50 per Wk (or \$30.00 per Mo)	19	\$ 15.00	\$150.00	.....
2-18 R. K.	Apt. 511 1550 Fillmore St. S F	11 24 49 to 12 24 49	\$45.00 per Mo	\$6.50 per Wk (or \$28.00 Mo.)	1	\$ 17.00	\$ 17.00	.....
2-19	Apt. 510 1550 Fillmore St. S F	3 1 49 to 1 1 50	\$58.00 per Mo	\$37.50 per Mo	10	\$ 20.50	\$205.00	.....
2-20 R. K.	Apt. 511 1550 Fillmore St. S F	1 1 49 to 1 15 50	\$48.00 per Mo	\$22.50 per Mo	10 1/2	\$ 25.50	\$267.75	.....
2-21 Winifred Kay Miyano Tani	Apt. 512 1550 Fillmore St. S F	3 1 49 to 9 1 49	\$47.00 per Mo	\$7.00 per Wk (or \$30.00 Mo.)	6	\$ 15.00	\$ 90.00	.....



United States District Court for the Northern
District of California, Southern Division
No. 29527

UNITED STATES OF AMERICA,
Plaintiff,
vs.

HENRY T. TANIMURA et al.,
Defendants.

AMENDMENTS TO COMPLAINT FOR IN-
JUNCTION, RESTITUTION AND TREBLE
DAMAGES

The complaint for Injunction, Restitution and Treble Damages, instituting the above-entitled action and filed on February 28, 1950, with the Clerk of the United States District Court at San Francisco, California, is hereby amended as follows:

1. Paragraph 5 of Count II is hereby amended so as to insert on line 4, after the word "Exhibit 'A'" the words "and Items 1(a) and 1(b) of Schedule marked Exhibit 'B'."

2. Paragraph 2 of the prayer of said complaint is hereby amended so as to delete from line 4 the words "Five Thousand, Sixty-six and 49/100 Dollars (\$5,066.49)" and to insert in lieu thereof the words and figures "Five Thousand One Hundred, Forty-five and 79/100 Dollars (\$5,145.79)."

Dated this 8th day of May, 1950.

/s/ RAYMOND J. FOX,

Litigation Attorney, Office of
Housing Expediter.

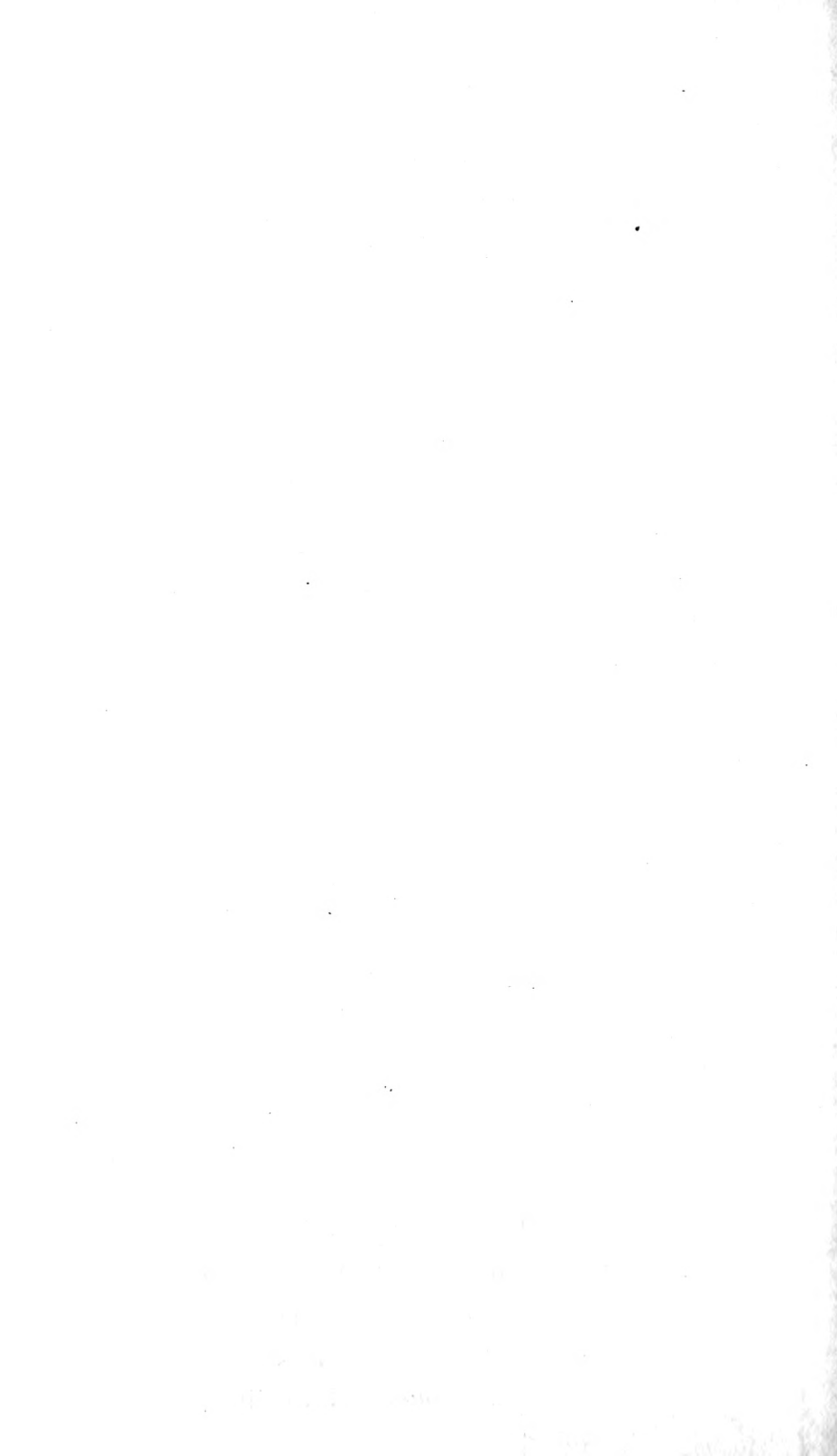




EXHIBIT B
SCHEDULE

Tenant Item 1	Unit	Date Rented	Rent Collected	Maximum Legal Rent	Number of Over- Charges	Amount of Each Overcharge	Overcharge to Each Tenant	Amount Subject Treble Dam
(a) Sumi Endo	Apt. #507 1550 Fillmore St., S. F.	10/ 1/48 to 11/30/48	\$45.00 Mo.	\$6.50 Wk. (\$28.00 Mo.)	2	\$17.00	\$34.00	.....
(b) Sumi Endo	Apt. #304 Same Address	12/ 1/48 to 2/20/49	\$45.00 Mo.	\$6.50 Wk. (\$28.00 Mo.)	2 $\frac{2}{3}$	\$17.00	\$45.30	.....

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 10, 1950.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Comes now the Defendant, Henry T. Tanimura, by his attorneys, C. Dan Lange and Clyde R. Rockwell, and for an answer to the complaint herein states as follows:

As and for Answer to the First Cause of Action
Called Count I Herein

First Defense

Defendant admits the allegations contained in Paragraph 4 of Count I of the Complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of said count of said complaint and denies each and every, all and singular, other allegations contained in said count and said complaint.

Second Defense

Count I of the complaint fails to state a cause of action which entitles the Plaintiff to any relief whatsoever or at all.

Third Defense

The right of action set forth in Count I of the complaint did not accrue within one year before the commencement of this action.

Fourth Defense

That the right of action set forth in Count I of the complaint is barred by laches.

As and for Answer to the Second Cause of Action
Called Count II Herein

First Defense

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Count II of the complaint; and denies each and every, all and singular, other allegations contained in said count and said complaint and specifically denies that the premises described in the complaint and more commonly known and described as the Anglo Hotel, are controlled housing accommodations and in this respect alleges that said premises was at all times mentioned in said count and now is a hotel within the meaning of the Housing and Rent Act of 1947 (50 U.S.C.A. App., 1892).

Second Defense

Count II of the complaint fails to state a cause of action which entitles the Plaintiff to any relief whatsoever or at all.

Third Defense

The right of action set forth in Count II of the complaint did not accrue within one year next before the commencement of this action.

Fourth Defense

That the right of action set forth in Count II of the complaint is barred by laches.

Fifth Defense

That the premises described in the complaint and more commonly known and described as the Anglo Hotel, was at all times mentioned in Count II and now is a hotel within the meaning and intent of the Housing and Rent Act of 1947 (50 U.S.C.A. App., 1892).

As and for Answer to the Third Cause of Action
Called Count III Herein

First Defense

Defendant admits the allegations contained in Paragraph 2 of Count III of the complaint; and denies each and every, all and singular, other allegations contained in said count and said complaint and specially denies that the premises described in said complaint, and more commonly known and described as the Anglo Hotel, are controlled housing accommodations and in this respect alleges that the premises was at all times mentioned in said count and now is a hotel within the meaning of the Housing and Rent Act of 1947 as amended (50 U.S.C.A. App., 1892).

Second Defense

Count III of the Complaint fails to state a cause of action which entitled Plaintiff to any relief whatsoever or at all.

Third Defense

That the effective date of the 1949 amendment to the Housing and Rent Act of 1947 as amended is

the 1st day of April, 1949, and the Plaintiff cannot recover treble damages for violations of the Housing and Rent Act of 1947, as amended prior to said effective date of said amendment.

Fourth Defense

That the premises described in the complaint and more commonly known and described as the Anglo Hotel, was at all times mentioned in Count III and now is a hotel within the meaning and intent of the Housing and Rent Act of 1947 as amended (50 U.S.C.A., 1892):

Fifth Defense

That if it is found that there were overcharges of rent by this answering Defendant resulting in violation of the Housing and Rent Act of 1947 as amended and as alleged in Plaintiff's complaint, said violations were neither wilful nor the result of failure to take practicable precaution against the occurrence of such violations of the Housing and Rent Act of 1947 as amended.

Wherefore, Defendant denies that Plaintiff is entitled to the relief prayed for in the complaint, or any part thereof, or to any other relief against this answering Defendant, and prays that the complaint be dismissed with costs.

Counterclaim

By way of counterclaim arising out of the transactions which is the subject matter of Plaintiff's claim, Defendant, Henry T. Tanimura, by his attor-

neys, C. Dan Lange and Clyde R. Rockwell, avers as follows:

I.

That Defendant now is the proprietor of the premises located at 1550 Fillmore Street in the City and County of San Francisco, State of California, and commonly known and described as the Anglo Hotel.

II.

That Plaintiff unreasonably claims and alleges as is more fully set forth in its complaint herein that said hotel premises are controlled housing accommodations with maximum legal rent ceilings within the provisions of the Housing and Rent Act of 1947 and as said Act was and is amended.

III.

That by Section 202 of the Housing and Rent Act of 1947 and as said Act and section was and now is amended, said hotel premises are not controlled housing accommodations.

IV.

That on or about the 18th day of November, 1949, Defendant requested that said hotel premises be declared decontrolled by the San Francisco Bay Defense Rental Area Director, and that the San Francisco Bay Defense Rental Area Director refused to rule on Defendant's request.

V.

That Plaintiff's wrongfully claiming that said hotel premises are controlled housing accommoda-

tions has caused Defendant irreparable harm in that it has depreciated the value of said hotel premises as hotel property.

Wherefore, Defendant prays that the hotel premises located at 1550 Fillmore Street in the City and County of San Francisco, State of California, and commonly known and described as the Anglo Hotel, be decreed to be hotel premises by way of declaratory judgment within the provisions of the Housing and Rent Act of 1947 and as such not controlled housing accommodations and as said Act was and now is amended, and for such other and further relief as to the Court seems just and proper.

LANGE AND ROCKWELL,

Attorneys for

Henry T. Tanimura.

By /s/ CLYDE R. ROCKWELL.

[Endorsed]: Filed August 31, 1950.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Comes now the Defendant, Henry T. Tanimura, by his attorneys, and respectfully demands the Court to order a jury trial of the issues in the above-entitled action pursuant to the authorization given under Rules 38 and 39 of the Federal Rules of Civil Procedure.

Dated this 28th day of August, 1950, at San Francisco, California.

LANGE & ROCKWELL,

By /s/ CLYDE R. ROCKWELL,
Attorneys for Defendant.

[Endorsed]: Filed August 31, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION, MOTION TO STRIKE
JURY DEMAND, POINTS AND AU-
THORITIES

Notice of Motion

To the Above-Named Defendants and Their Attorneys, Lange & Rockwell, 200 Bush Street, San Francisco 4, California:

Please Take Notice that the undersigned will bring the following motion on for hearing before this Court in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, at 10:00 a.m. on the 9th day of October, 1950, or as soon thereafter as counsel can be heard:

MOTION TO STRIKE JURY DEMAND

The Plaintiff hereby moves the Court to strike the demand for jury trial recently made by the Defendant in this cause, on the ground that no right of trial by jury of the issues here involved exists under the Constitution or Statutes of the United States.

Points and Authorities

1. Rule 39(a) of the Federal Rules of Civil Procedure provides in material part that:

“When trial by jury has been demanded * * * the trial of all issues so demanded shall be by jury, unless * * * the court upon motion or of its own initiative finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or Statutes of the United States.”

2. The overwhelming majority of pertinent court decisions hold that no right of trial by jury exists under the Constitution or statutes of the United States for cases such as the present one, brought up by the United States under the Housing and Rent Act of 1947 as amended, for equitable relief and statutory damages.

For example, as Chief Judge Sweeney of the United States District Court for the District of Massachusetts said in a memorandum opinion dated October 6, 1949, in *United States v. Shaughnessy* (Civil Action No. 8355),

“This action was brought by the United States, based upon an alleged overcharge by the defendant of monthly rentals in violation of the Housing and Rent Act of 1947, 50 U.S.C.A., App. 1895, et seq. The Government seeks injunctive relief against the defendant, and demands the statutory damages for the alleged violations. The damages sought are in the nature of a penalty when sued for by the

United States, and this right to sue exists only where the tenant himself has failed to bring his action. It is essentially what would be an old action in equity and, as such, is triable before a court without a jury. *Pallant v. Sinatra, et al.*, 59 F. Supp. 684; *Arnstein v. Twentieth Century Fox Film Corporation, et al.*, 3 F.R.D. 58. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48, where the court stated that the right to a trial by jury has no application to cases where a recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law, and cases cited there."

Other District Courts have reached the same conclusion in the following cases:

United States v. Osipoff, etc.,

(Civil Action No. 1106—S.D., Cal.) Aug. 8, 1949.

United States v. Cherico,

(Civil Action No. 7848—W.D., Pa.) Dec. 5, 1949.

United States v. Caldwell,

(Civil Action No. 4387—W.D., N. Y.) Jan. 23, 1950.

United States v. Stein,

(Civil Action No. 3212—M.D., Pa.) Feb. 20, 1950.

United States v. Max Friedman, et al.,

(Civil Actions Nos. 1-24, 25, 26—S.D., Iowa) April 11, 1950.

United States v. Kennedy,
(Civil Action No. 803—Nevada) April. 19,
1950.

United States v. Sicherer,
(Civil Action No. 805—Nevada) Apr. 19,
1950.

United States v. Kenter,
(Civil Action No. 29522—N.D., Calif.) May
16, 1950.

United States v. Barrett,
(Civil Action No. 9749—E.D., Pa.) June
21, 1950.

United States v. Inwood,
(Civil Action No. 29516—N.D., Calif.)
Aug. 14, 1950.

To the same effect, under the comparable provisions of the Emergency Price Control Act of 1942, as amended, (50 U.S.C.A., App. 901 et seq.), are:

Creedon v. Arielly,
(Civil Action No. 3351—W.D., N.Y.) 8
F.R.D. 265; 11 Federal Rules Service
56c41, Case 11

Woods v. Endekay Realty Corp.
(Civil Actions #44-302, #43-704 S.D.,
N.Y.)

United States v. Hall,
(Civil Action No. 998-NC)
Contra: United States v. Jepson,
(Civil Action No. 561-49—N.J.)

Careful review of all available references shows the only decisions to the contrary to be:

United States v. Hart,

86 F. Supp. 787 (W.D. Va.)

United States v. Strymish,

86 F. Supp. 999 (Mass.)

United States v. Elaine Friedman,

(Civil Action No. 2821-Conn.) Apr. 24, 1950

In the opinion of the Plaintiff, the foregoing cases cited in its favor, particularly United States v. Shaughnessy, are not only more representative of judicial opinion throughout the United States, but more soundly reasoned than those to the contrary.

Wherefore, pursuant to Rule 39(a) of the Federal Rules of Civil Procedure and the cited precedents, Plaintiff submits that the Defendant's demand for jury trial of this cause should be denied by the Court.

Dated this 28th day of September, 1950.

/s/ WM. B. SPOHN,

Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 28, 1950.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 9th day of October, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This case came on regularly this day for hearing on motion to strike jury demand and motion to dismiss counterclaim. After hearing respective counsel, it is Ordered that said motions be granted.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause was commenced on February 28, 1950, the Plaintiff seeking restitution under the Emergency Price Control Act of 1942 as amended (50 U.S.C.A. App. 901 et seq.), and treble damages, injunction and restitution under the Housing and Rent Act of 1947 as amended (50 U.S.C.A. App. 1881 et seq.). Personal service of the complaint and summons as required by the Federal Rules of Civil Procedure was made upon the De-

fendant Henry T. Tanimura on March 8, 1950, by a Deputy United States Marshal, who reported that service could not be made on the other Defendants Charles S. Lee and Carol W. Lee, since they had moved to Hawaii.

The complaint was later amended on May 10, 1950, the Plaintiff seeking additional restitution and damages under the Housing and Rent Act. A copy of the amendment was duly served upon the Defendant Tanimura and his counsel.

Thereafter, on August 14, 1950, the motion of the Defendant Tanimura to dismiss, to strike, and to make more definite, was heard and denied in its entirety by this Court, the Honorable Louis E. Goodman, Judge presiding. On October 9, 1951, the motions of the Plaintiff to strike the jury demand and to dismiss the counterclaim filed by the Defendant Tanimura were heard and granted by this Court, the Honorable Michael J. Roche, Judge presiding. The motion of the Plaintiff to dismiss the cross-complaint filed by the Defendant Tanimura was similarly heard on January 15, 1951, by this Court, the Honorable George B. Harris, Judge presiding, and granted January 30, 1951.

Following answers by the Defendant Tanimura to the complaint as amended, and to the request for admissions and interrogatories served by the Plaintiff, and answer by the Plaintiff to the request for admissions served by the Defendant Tanimura, the cause came regularly on for trial on February 9 and 12, 1951, before this Court, the Honorable Michael J. Roche, Judge presiding, and the Plain-

tiff appearing by its counsel William B. Spohn and the Defendant Tanimura appearing in person and by his counsel C. Dan Lange and Clyde R. Rockwell. Upon oral motion by counsel for the Plaintiff based on the aforesaid lack of service, the action was dismissed without prejudice as to the Defendants Charles S. Lee and Carol W. Lee. Evidence both oral and documentary was introduced by and on behalf of the remaining parties and oral arguments made by counsel. At the conclusion of trial and upon submittal, the Court, being fully advised in the premises, gave oral judgment for the Plaintiff in the form of an injunction, restitution of overcharges on behalf of the tenants, and costs, but refused to award damages to the Plaintiff.

Thereafter, Plaintiff moved the Court to reconsider its refusal to award damages. This motion was heard on March 5 and 12, 1951, before the Court, the Honorable Michael J. Roche, Judge presiding, and the parties appearing by the counsel aforementioned. Upon conclusion of the hearing and submittal, the Court modified its previous oral judgment and awarded Plaintiff damages in the amount of the overcharges which had occurred within one year immediately preceding the institution of this action.

Wherefore, the Court makes the following:

Findings of Fact

(1) That the housing accommodations described in the complaint as amended are located within the San Francisco Bay Defense-Rental Area.

(2) That on June 30, 1947, the establishment in which the housing accommodations are located was not commonly known as a hotel in the community, nor were the occupants thereof provided customary hotel services.

(3) That the maximum legal rents prescribed for the housing accommodations under the aforesaid Acts and the Regulations issued pursuant thereto were as specified in the complaint as amended during the periods of time material to this action.

(4) That during such periods of time, the Defendant Tanimura did demand, accept, and receive the following amounts in excess of the legal maximum rents from the named tenants for and in connection with the housing accommodations:

Frank T. Hara.....	\$ 35.87
Stanley Sakuda.....	660.00
Robert Kiyota.....	287.00
Chas. Masada.....	204.00
Geo. K. Komatsu.....	594.50
Kazutami Tani.....	112.00
Mariam Tani.....	207.00
Grace Miyamoto.....	273.00
Henry Yoshida.....	20.00
Suyiki Vyemura	517.50
Rae Gordon.....	60.00
Lillian Hiraiki.....	228.00
Aiko Yoshikawa.....	384.00
Jane Hiwano Yamasaki.....	165.00
Jules R. Kalisch.....	17.00
E. J. Nomura.....	195.00
Daigaro Tani.....	594.50

George Ikeda.....	465.50
Winifred Kim.....	165.00
Sumi Endo.....	68.00
Harumi Kameda.....	410.00
<hr/>	
Total	\$5,662.87

(5) That no action has been instituted by any of the named tenants under either of the aforesaid Acts on account of the overcharges here involved, and more than thirty (30) days have elapsed since the last such overcharge.

(6) That a total of One Thousand Six Hundred Seventy-seven and 50/100 Dollars (\$1,677.50) of the aforesaid overcharges occurred within one year immediately preceding the institution of this action.

Conclusions of Law

(1) That the Court has jurisdiction of the subject-matter of this action and of the remaining parties under each of the aforesaid Acts.

(2) That the housing accommodations in question were during all times material to this action controlled under the aforesaid Acts and the Regulations issued pursuant thereto.

(3) That during all such times, the maximum legal rents prescribed for the housing accommodations under the Acts and Regulations were as specified in the complaint as amended.

(4) That the Defendant Tanimura violated the Acts and Regulations by demanding, accepting, and receiving the excess amounts specified in the foregoing Findings of Fact.

(5) That the Plaintiff on account of said violations is entitled to have and recover damages from the Defendant Tanimura in the total amount of One Thousand Six Hundred Seventy-seven and 50/100 Dollars (\$1,677.50) as aforesaid.

(6) That the Plaintiff on account of said violations is entitled to an injunction against any further violations by the Defendant Tanimura under the aforesaid Housing and Rent Act and Regulations as prayed for in the complaint as amended.

(7) That the Plaintiff on account of said violations is entitled to a judgment and decree requiring and directing the Defendant Tanimura to refund forthwith to the Plaintiff on behalf of the aforesaid tenants, or in the alternative to the Plaintiff on its own behalf in the event any of said tenants cannot be located after appropriate effort, the excess amounts demanded, accepted, and received by the Defendant Tanimura in the total amount of Five Thousand Six Hundred Sixty-two and 87/100 (\$5,662.87).

(8) That the Plaintiff is entitled to its costs in this action.

Let judgment be entered in accordance herewith.

Dated this 13th day of April, 1951.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Lodged]: April 9, 1951.

[Endorsed]: Filed April 13, 1951.

United States District Court for the Northern
District of California, Southern Division

No. 29527

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY T. TANIMURA,

Defendant.

JUDGMENT AND DECREE

Findings of Fact and Conclusions of Law having been filed in the above-entitled cause,

Wherefore, by reason of the law, the pleadings, and the premises contained in said Findings and Conclusions.

It Is Hereby Ordered, Adjudged, and Decreed that the Defendant Henry T. Tanimura, his attorneys, agents, servants, employees and all other persons in active concert or participation with the Defendant, be and they are hereby permanently enjoined and restrained from directly or indirectly demanding, accepting, or receiving rents in excess of the maximum rents established by any regulation or order heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or from engaging in any other acts or practices which violate the said Act or any regulation or order adopted pursuant thereto.

It Is Further Ordered, Adjudged, and Decreed that the Defendant be and he is hereby required and directed to forthwith make restitution to the Plain-

tiff on behalf of the following named tenants, or in the alternative to the Plaintiff on its own behalf in the event any of said tenants cannot be located after appropriate effort, for the overcharges in the rental of the housing accommodations specified in this cause in the following sums, with interest at the rate provided by law:

Frank T. Hara.....	\$ 35.87
Stanley Sakuda.....	660.00
Robert Kiyota.....	287.00
Chas. Masada.....	204.00
Geo. K. Komatsu.....	594.50
Kazutami Tani.....	112.00
Mariam Tani.....	207.00
Grace Miyamoto.....	273.00
Henry Yoshida.....	20.00
Suyiki Vyemura	517.50
Rae Gordon.....	60.00
Lillian Hiraiki.....	228.00
Aiko Yoshikawa.....	384.00
Jane Hiwano Yamasaki.....	165.00
Jules R. Kalisch.....	17.00
E. J. Nomura.....	195.00
Daigaro Tani.....	594.50
George Ikeda.....	465.50
Winifred Kim.....	165.00
Sumi Endo.....	68.00
Harumi Kameda	410.00

Total\$5,662.87

It Is Further Ordered, Adjudged, and Decreed that the Plaintiff do have and recover of and from

the Defendant the sum of One Thousand Six Hundred Seventy-seven and 50/100 Dollars (\$1,677.50), to be paid forthwith as damages for the violations of the Act and Regulations involved in the afore-said overcharges occurring within one year immediately preceding the institution of this action, with interest at the rate provided by law.

It Is Further Ordered, Adjudged, and Decreed that the Plaintiff do have and recover of and from the Defendant its costs in the amount of Eighty-two Dollars and Forty-six Cents (\$82.46), to be taxed by the Clerk and paid forthwith by the Defendant.

It Is Further Ordered, Adjudged, and Decreed that all payments made pursuant to this judgment and decree shall be made to the Treasurer of the United States at the Litigation Section of the Office of the Housing Expediter, Room 712, Pacific Building, 821 Market Street, San Francisco 3, California.

Dated this 13th day of April, 1951.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 13, 1951.

[Entered]: April 16, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Henry T. Tanimura, Defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the orders denying him a jury trial and from the final decree and judgment entered in this action on the 16th day of April, 1951.

Dated: This 11th day of June, 1951.

LANGE & ROCKWELL,
Attorneys for Appellant.

By /s/ CLYDE R. ROCKWELL.

[Endorsed]: Filed June 14, 1951.

In the Southern Division of the United States District Court for the Northern District of California

No. 29527

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY T. TANIMURA, CHARLES S. LEE, and
CAROL W. LEE,

Defendants.

Before: Hon. Michael J. Roche,
Judge.

MOTION TO STRIKE JURY DEMAND,
MOTION TO DISMISS COUNTERCLAIM

REPORTER'S TRANSCRIPT

Monday, October 9, 1950

Appearances:

For the Plaintiff:

WILLIAM B. SPOHN, ESQ.

For the Defendants:

C. DAN LANGE, and

CLYDE R. ROCKWELL, by

CLYDE R. ROCKWELL, ESQ.

The Clerk: United States vs. Tanimura, motion to strike jury demand, motion to dismiss counterclaim.

Mr. Spohn: Your Honor please, this matter arises under the Housing and Rent Act of 1947. Before the Court this morning are two motions filed by the plaintiff, first, to strike the jury demand which has been made by the defendant, the second to dismiss the counterclaim which the defendant has made against the plaintiff in answer.

As to the motion to strike jury demand, points and authorities are set forth in some detail in the memorandum attached to our motion. In brief, we move to strike the jury demand on the ground that no right of trial by jury of the issues involved in a case of this sort exists under the Constitution or the statutes of the United States. In support of our position we have cited not only Rule 39(a) of the Rules but all of the pertinent court decisions on the matter, with particular reference to the previous decisions of this Court and also a decision by Chief Judge Sweeney of the United States District Court for the District of Massachusetts, a pertinent excerpt of which is set forth in our memorandum. In brief, we are prepared to submit it on the strength of the memorandum we have so submitted.

The Court: I would like to hear from the other side.

Mr. Rockwell: This complaint on file herein, your Honor, is a complaint in three counts. One count is on the Emergency Price Control Act of 1942; one count is on the Housing and Rent Act of 1947; and one count is for treble damages within

the period of one year prior to the filing of the action under the Rent and Housing Act of 1947.

As to the first count, our contention is that it is a straight action for money. It is called restitution. Well, restitution in common law was an action for money, and we contend that under a determination of the revision of the Emergency Price Control Act of 1942, Congress provided that the Act was to be terminated, except that as to offenses committed, or rights and liabilities incurred prior to the termination date of this Act in such regulations shall continue. Well, it doesn't mean—it means that rights for recovery of money damages shall continue, but not rights to enforce the Act. The Act has terminated, and therefore the action is not an action at law for money and there is not right for an injunction.

The Court: How much money is involved?

Mr. Rockwell: We have about \$10,000 involved in the three counts. The second count is an action for an injunction and restitution and they are clearly entitled—we are not entitled to a jury trial on that count.

The third count is an action for treble damages and under the points and authorities cited by counsel, he states that Chief Judge Sweeney states the proper proposition. Well, I agree with him that the Judge recognizes, at least, that the damages sought are in the nature of a penalty, and if they are a penalty we are entitled to a jury trial.

The Court: Judge Sweeney said no.

Mr. Rockwell: Well, Judge Sweeney did say no,

but if it is a penalty we are entitled to a jury trial. It is an action at law. The Supreme Court held under the Emergency Price Control Act in the Porter case, which is the leading case, that as to treble damages it is a penalty and it is an action at law and we take the position if it is an action at law we are entitled to a jury trial.

The Court: Was this a jury trial?

Mr. Rockwell: This was an equitable action.

The Court: You can't find a jury trial, can you?

Mr. Rockwell: Well, yes, of the recorded decisions, there are three recorded decisions on this and two decisions granted jury trials.

The Court: Briefly, what are the facts? You are familiar with the cases, familiarize the Court with them.

Mr. Rockwell: Each case is a case under the Emergency—I mean Housing and Rent Act of 1947, and there are two parts of them, each decision, I believe. They hold, one part they hold restitution for the period past a year and for a year and over the Government wants treble damages. In two of the decisions it was decided the Government was entitled to—I mean, defendant was entitled to a jury trial. In one of the recorded decisions he wasn't entitled to a jury trial. Now, these are District Court decisions. They list about eight or nine decisions holding they are entitled to a jury trial.

The Court: Now, the case you cited, what was the final determination of that, what did the jury do?

Mr. Rockwell: I do not know, your Honor.

The Court: You do not know.

Mr. Spohn: I can supply that answer, your Honor. In *United States vs. Harding*, the United States was sustained, the jury decided in favor of the plaintiff on the pleadings and what had been submitted. In other words, although there was a jury trial granted the plaintiff prevailed.

Mr. Rockwell: Under those facts maybe the plaintiff was entitled to prevail. We contend, having \$10,000 involved in this case, it is a very large establishment, we contend it is a hotel and always contended it is a hotel, and the Government disagrees with us. We feel we should have a jury trial on the issue.

The Court: Well, in order to settle this question, I have met it a number of times, I don't think you are legally entitled to it. I may be in error. I say that kindly. If you think that I am, why, go forward and thresh it out. It has come up a number of times. So far as I am concerned, why, I don't mind having a jury trial, but if we venture out in one case and set a precedent—it has never occurred in this Circuit. I say that kindly.

Mr. Rockwell: I realize that, your Honor.

The Court: Denied.

Mr. Spohn: Your Honor please, the other motion which we have made as plaintiff is to dismiss the counterclaim which the defendant has asserted. Our points and authorities are set forth at some length. There are four points in particular, with all of which the Court is thoroughly familiar.

The Court: I think it is a case of law, we will have to take up that question, dispose of that.

Mr. Rockwell: Your Honor, we would like to at this time allow the Court to dismiss the counterclaim and have leave to file a cross-complaint joining William Bledsoe, I believe, the Area Rent Director, the San Francisco Bay Defense Director; our authority is a Ninth Court decision, 177 Fed. 2nd 125, wherein it was held declaratory relief against the Area Rent Director could be had, a very similar case to this.

The Court: You want me to deny your motion?

Mr. Rockwell: I would suggest having the Court grant the motion to dismiss and allow leave to file a cross-complaint.

The Court: So ordered.

Mr. Rockwell: Thank you, your Honor.

Mr. Spohn: Your Honor, we will not be restricted from opposing that cross-complaint?

The Court: I can't control you, pursue your remedy at law.

Mr. Spohn: We shall do that.

[Endorsed]: Filed July 5, 1951.

[Title of District Court and Cause.]

MOTION, DEMAND FOR JURY TRIAL

REPORTER'S TRANSCRIPT

Friday, February 9, 1951

Appearances:

For the Plaintiff:

WILLIAM B. SPOHN, ESQ.

For the Defendant:

CLYDE R. ROCKWELL, ESQ.

10:00 o'Clock A.M., Friday, February 9, 1951

Mr. Rockwell: And the last motion, a matter which was argued before the Court and I know the Court's attitude on it, is that we still stand on the right to demand a jury trial, and I assume that our demand is denied.

The Court: Denied.

* * *

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, or true copies of orders entered in this Court, in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for injunction, etc.

Amendments to complaint.

Answer and counterclaim.

Demand for jury trial.

Notice of motion and motion to strike jury demand.

Order granting motion to strike jury demand.

Findings of fact and conclusions of law.

Judgment and decree.

Notice of appeal.

Designation of record on appeal.

Amended designation of record on appeal.

Reporter's transcript, October 9, 1950.

Reporter's transcript, February 9, 1951 (portion).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 16th day of July, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13014. United States Court of Appeals for the Ninth Circuit. Henry T. Tanimura, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 16, 1951.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 13014

HENRY T. TANIMURA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Appellant sets forth the following points on which he intends to rely on appeal:

1. The Court erred in sustaining Plaintiff's motion to strike Defendant's demand for trial by jury.

2. The Court erred in refusing to grant to the Defendant a trial by jury.

Appellant states that only the following parts of the record, as filed in this Court, are deemed necessary to be printed for the consideration of the points set forth above:

1. The Complaint;
2. The Amendment to the Complaint;
3. The Answer to the Complaint;
4. The Defendant's jury trial demand;
5. Notice of Motion to strike jury trial demand;
6. Reporter's transcript of proceedings on motion to strike jury trial demand;
7. Order striking jury trial demand;

8. Reporter's transcript of Defendant's motion for trial by jury at commencement of trial proceeding and Court's ruling thereon;

9. Findings of fact and conclusions of law;

10. Judgment and Decree; and

11. Notice of Appeal.

Dated: This 20th day of July, 1951.

LANGE & ROCKWELL,
Attorneys for Appellant.

By /s/ CLYDE R. ROCKWELL.

[Endorsed]: Filed July 23, 1951.

No. 13,014

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HENRY T. TANIMURA,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

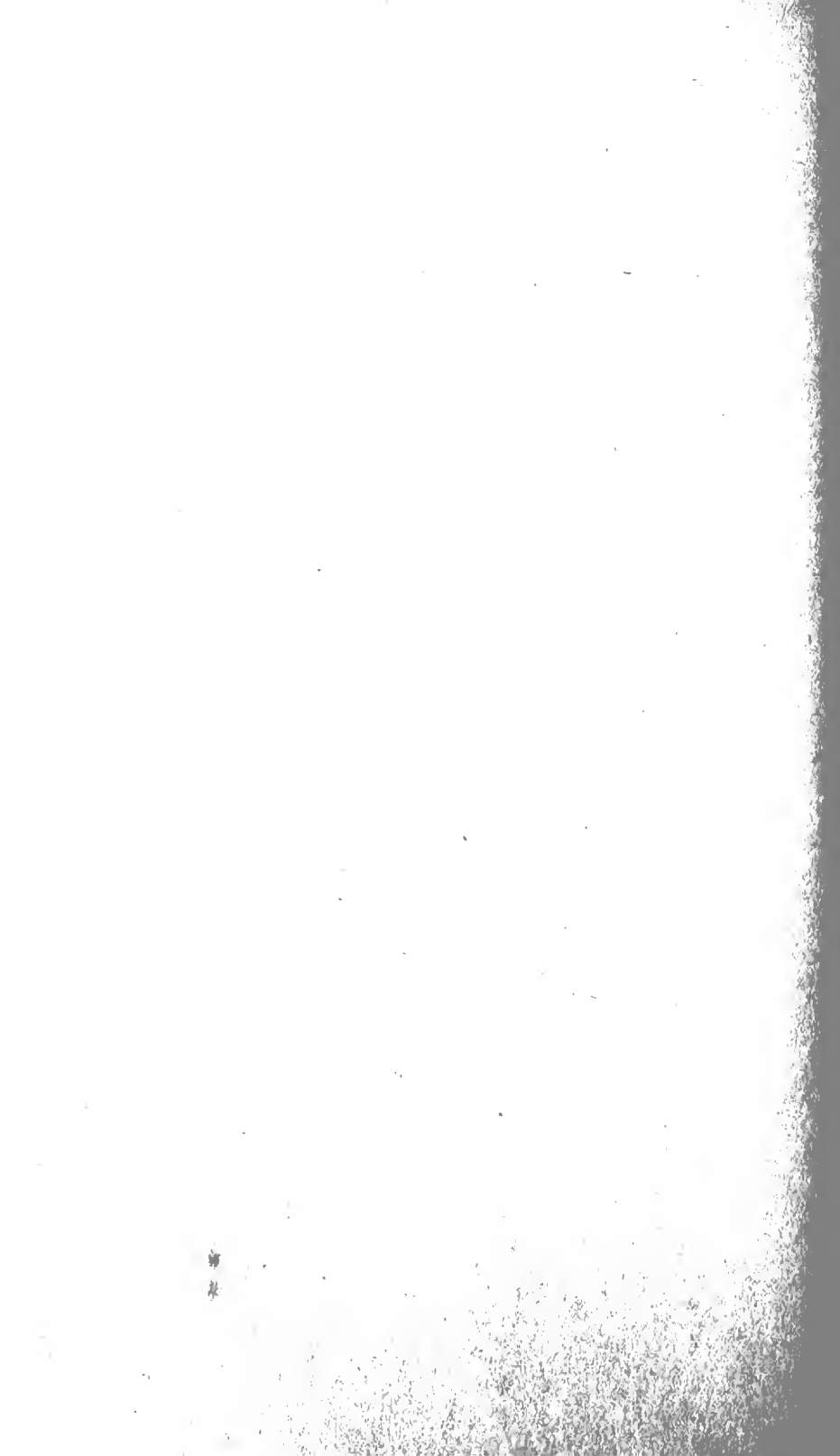
OPENING BRIEF FOR APPELLANT.

C. DAN LANGE,

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No. 13,014

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HENRY T. TANIMURA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment and decree (T.R. 30-32) of the District Court of the United States for the Northern District of California, Southern Division, in an action (T.R. 3-12) against appellant under the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Sections 1895 and 1896(b)).

Jurisdiction below was based on 50 U.S.C.A. Appendix Sections 1895, 1896(b) and 1896(c). Jurisdiction of this Court is conferred by 28 U.S.C.A. Section 1291.

**STATUTES AND CONSTITUTIONAL
PROVISIONS INVOLVED.**

(1) The Seventh Amendment to the Constitution of the United States:

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.”

(2) Section 205 of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Section 1895):

“Recovery of damages: Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under Section 204 (section 1894 of this appendix) shall be liable to the person from whom he demands, accepts or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney’s fees and costs as determined by the court, plus liquidated damages in the amount of (1) \$50.00, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceeds the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: Provided, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such

amount may be brought in any Federal, State, or territorial court of competent jurisdiction within one year after the date of such violation: Provided, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered.”

(3) Section 206(b) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Section 1896(b)):

“Prohibition and enforcement: (b) Whenever in the judgment of the Housing Expeditor any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act (section 1881-1910 of this Appendix), or any regulation or order issued thereunder, the United States may make application to any Federal, State, or territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

STATEMENT OF THE CASE.

This is an action (T.R. 3-12 and 24) commenced in the name of the United States of America against Henry T. Tanimura, appellant, Charles S. Lee and Carol W. Lee for restitution of rent overcharges under Section 205(a) of the Emergency Price Control Act of 1942, as amended (U.S.C.A. Section 925(a)), and under Section 206(b) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Section 1896(b)) for treble damages under Section 205 of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. Appendix 1895) for all violations occurring within the one-year period prior to the commencement of the action and for an injunction restraining future violation under Section 206(b) of the Housing

and Rent Act of 1947, as amended (50 U.S.C.A. Appendix Section 1896(b)).

The answer (T.R. 13-16) of appellant denied generally the allegations of the complaint and set forth several specific defenses one of which (T.R. 16) was that the premises in question had become de-controlled housing accommodations by reason of its being a hotel on the effective date of the Housing and Rent Act of 1947 (50 U.S.C.A. Appendix Section 1892(c)(1)(A)). On filing his answer, appellant duly made demand for a trial by jury (T.R. 18-19) pursuant to Rule 38b. of the Federal Rules of Civil Procedure. Appellee thereafter moved (T.R. 19-23) the lower Court to strike appellant's demand for trial by jury, and upon a hearing (T.R. 34-39) of the motion, the motion to strike the jury demand was granted (T.R. 24).

Thereafter the cause was set for trial by Court and duly came to trial by Court before the Honorable Michael J. Roche (T.R. 25). Appellee moved to dismiss the action insofar as it sought relief under the Emergency Price Control Act of 1942, as amended, and to dismiss the action as against Charles S. Lee and Carol W. Lee for lack of service of summons and complaint (T.R. 26). Appellee's motions were granted (T.R. 26). Appellant moved the Court for trial by jury (T.R. 40), and the motion was denied (T.R. 40). Evidence both oral and documentary was introduced, the principal issue being whether the premises in issue were in fact a hotel and as such de-controlled housing accommodations. The cause was submitted and the Court rendered judgment for ap-

pellee and against appellant ordering restitution of all rent overcharges (T.R. 30-31) and in addition thereto single damages by way of penalty for all overcharges occurring within the one-year period prior to the commencement of the action (T.R. 32) and an injunction against future violations of the Housing and Rent Act of 1947, as amended (T.R. 30). This appeal is from said judgment and decree (T.R. 30-33).

ARGUMENT OF THE CASE.

THE SOLE QUESTION PRESENTED BY THIS APPEAL IS WHETHER THE LOWER COURT ERRED IN DENYING TO APPELLANT A TRIAL BY JURY OF SOME OR ALL OF THE ISSUES OF THIS CAUSE.

- A. Refusal to grant a jury trial when a litigant is entitled to the same is reversible error.

The right to a trial by jury is preserved and determined by the Seventh Amendment to the Constitution of the United States. Refusal to grant a jury trial when a litigant is entitled to and duly demands the same is reversible error.

Lewis v. Times Publishing Co., 185 F. (2d) 457.

- B. An action under Section 205 of the Housing and Rent Act of 1947, as amended, is an action at law involving a penalty.

An action seeking a forfeiture, punitive damages or penalty damages is one at law entitling a litigant to a trial by jury.

Hepner v. U.S., 213 U.S. 103, 115;

Vandevander v. U.S., 172 F. (2d) 100, 101;

Fontenat v. Accardo, 278 F. 871, 876.

An action under Section 205 of the Housing and Rent Act of 1947, as amended, *supra*, is an action to enforce a penalty.

U.S. v. Hart, 86 F. Supp. 787, 788-789;

U.S. v. Jepson, 90 F. Supp. 983, 984;

U.S. v. Friedland, 94 F. Supp. 721, 724.

Even the decisions which have denied to the defendant a jury trial recognize that an action to recover treble damages under Section 205 of the Housing and Rent Act of 1947, as amended, *supra*, involves a penalty.

U.S. v. Shaughnessy, 86 F. Supp. 175.

Likewise an action under Section 206(e) of the Emergency Price Control Act of 1942, as amended, to recover treble damages is an action to enforce a penalty.

Bowles v. Farmers Nat. Bank of Lebanon, Ky.,
147 F. (2d) 425, 429;

Porter v. Warner Holding Co., 328 U.S. 395,
402.

There is a mandatory necessity of imposing damages under Section 205 of the Housing and Rent Act of 1947, as amended, *supra*, when the United States commences an action after a violation has occurred.

Mattox v. U.S., 187 F. (2d) 406, 408.

In that case, *Mattox v. U.S.*, *supra*, like the one now before the Court, the damages so imposed in favor of the United States under Section 205 of the Housing and Rent Act of 1947, as amended, in no way could be considered as compensation for any injury sustained

by the United States where there is a restitution order, likewise in that case like this one, which completely compensates the injured parties for all damages sustained.

In *Porter v. Warner Holding Co.*, supra, 328 U.S. 395, at pages 401-402, the Supreme Court clearly stated the legal nature of an action under Section 205(e) of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. 925 (e) which for the purposes here involved is identical to Section 205 of the Housing and Rent Act of 1947, as amended, supra:

“It is true that Section 205(e) authorizes an aggrieved purchaser or tenant to sue for damages on his own behalf; and if that person has not sued within the statutory period, or for any reason is not entitled to sue, the Administrator may institute an action for damages on behalf of the United States. To the extent that damages might be properly awarded by a court of equity in the exercise of its jurisdiction under Sec. 205(a), see *Veazie v. Williams*, 8 How. 134, 160, Sec. 205(e) supercedes that possibility and provides an exclusive remedy relative to damages. It establishes the sole means whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in nature of penalties. Moreover a court giving relief under Sec. 205(e) acts as a court of law rather than a court of equity. But with the exception of damages, Sec. 205(e) in no way conflicts with the jurisdiction of equity courts under Sec. 205(a) to issue whatever ‘other order’ may be necessary to vindicate the public interest * * *.”

C. Joinder of a cause of action seeking treble damages under Section 205 of the Housing and Rent Act of 1947, as amended, with a cause of action seeking equitable relief under Section 206(b) of the Housing and Rent Act of 1947, as amended, cannot deprive the defendant of his right to a jury trial to all legal issues affecting the right to recover treble damages.

The following reported decisions, all by United States district courts, hold that where a penalty by way of treble damages is sought under the Act, the defendant is entitled to a trial by jury regardless of the fact that equitable relief was also sought under the Act.

U.S. v. Hart, *supra*, 86 F. Supp. 787, 788-789;
U.S. v. Stymish, 86 F. Supp. 999, 1000-1001;
U.S. v. Jepson, *supra*, 90 F. Supp. 983, 984-986;
U.S. v. Friedland, *supra*, 94 F. Supp. 721, 723-724;
U.S. v. Mesna, 11 F.R.D. Supp. No. 1 page 86, 87-88.

Appellant found only two reported decisions, likewise all by United States District Courts, denying a jury trial in a case like the one now before the Court.

U.S. v. Shaughnessy, *supra*, 86 F. Supp. 175;
Creedon v. Arielly, 8 F.R.D. 265, 268 (this decision involved an action under the Emergency Price Control Act of 1942, as amended).

It is admitted that there are many unreported decisions by United States district courts both granting and denying jury trials in a situation as is now before the Court.

Neither of the aforementioned decisions denying a jury trial cited or discussed *Porter v. Warner Holding Co.*, *supra*, 328 U.S. 395, although all of the aforementioned decisions granting a jury trial, except *U.S. v. Stymish*, *supra*, cited *Porter v. Warner Holding Co.*, *supra*.

It is appellant's position that those decisions granting a jury trial in a case like the one now before the Court are correct under the decided principles as to the right to a trial by jury. Under a unified system of administration of law as now exist in the Federal District Courts the distinctions between legal and equitable jurisdiction are no longer of great importance other than determining the right of trial by jury. But when the question arises as to the right to trial by jury as to some or all of the issues of a cause then those distinctions become important. This Court has stated the principle to be followed in determining the right of a jury trial in the decision of *Johnson v. Gardner*, 179 F. (2d) 114, 116-117:

"The right to a jury trial in the domain or field of equity such as is here involved is determined by the issues of fact that are pleaded in the concrete suit and the type and quality of remedies that are applicable and available to the suitor. This has been the yardstick which has been applied under the ancient divisions of law and equity and the single civil action in the unified procedure under the federal rules."

To a similar effect:

Dimick v. Schiedt, 293 U.S. 473, 476;

The Honorable Charles E. Clark in his book,
Code Pleading, second edition, at page 92.

Applying this principle the Supreme Court held in *Fleitman v. Welsback St. Lighting Co. of America*, 240 U.S. 27, 29, that in a suit seeking treble damages and equitable relief under the Sherman Anti-Trust Act that the defendant had an absolute right to trial by jury. In that decision the Supreme Court stated

“When a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law.”

Applying the same principle this Court held that penalty damages could not be given by a Court exercising equitable jurisdiction for it would result in a denial to the defendant of his right to trial by jury.

Connolly v. U.S., 149 F. (2d) 666, 669.

It is respectfully submitted that of the two lines of decisions by the United States District Courts, that line which grants a trial by jury in a cause as is now before the Court more correctly follows the established principles as to the right of trial by jury. If the reasoning of *U.S. v. Jepson*, *supra*, 90 F. Supp. 983, is not correct, then, it can only be concluded that under the unified procedure established by the Federal Rules of Civil Procedure there never could be as a matter of right a trial by jury if the complaint prayed some type of equitable relief. If such were the case plain-

tiff could always bar a defendant from securing a jury trial by merely praying some equitable relief in the complaint. The liberal joinder provisions of Rule 18 of the Federal Rules of Civil Procedure were never intended to deprive a litigant of his right to a jury trial and Rule 38a. so provides. This is substantially the position taken in *Bruckman v. Hollzer*, 152 F. (2d) 730, wherein this Court stated at page 732:

“We agree with these judges that the Federal Rules of Civil Procedure make such a preservation of the demanded right of jury trial and that to that end the trial judge is required to try and determine that issue before the others. The rules introduce the radical change in the federal practice of creating the jurisdiction in the district courts to hear and determine in a single suit equity claims, with a claim which theretofore should have a common law adjudication in a separate suit. We take it that it is to ‘preserve’ in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that rule 38a. provides: ‘(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.’ ”

CONCLUSION.

For the reasons hereinabove stated the lower Court erred in refusing to grant to appellant a trial by jury of all issues affecting appellee's legal claim for treble damages, and that therefore the judgment and decree herein should be reversed with direction that those issues affecting that legal claim be first tried by jury before any judgment or decree shall be herein rendered.

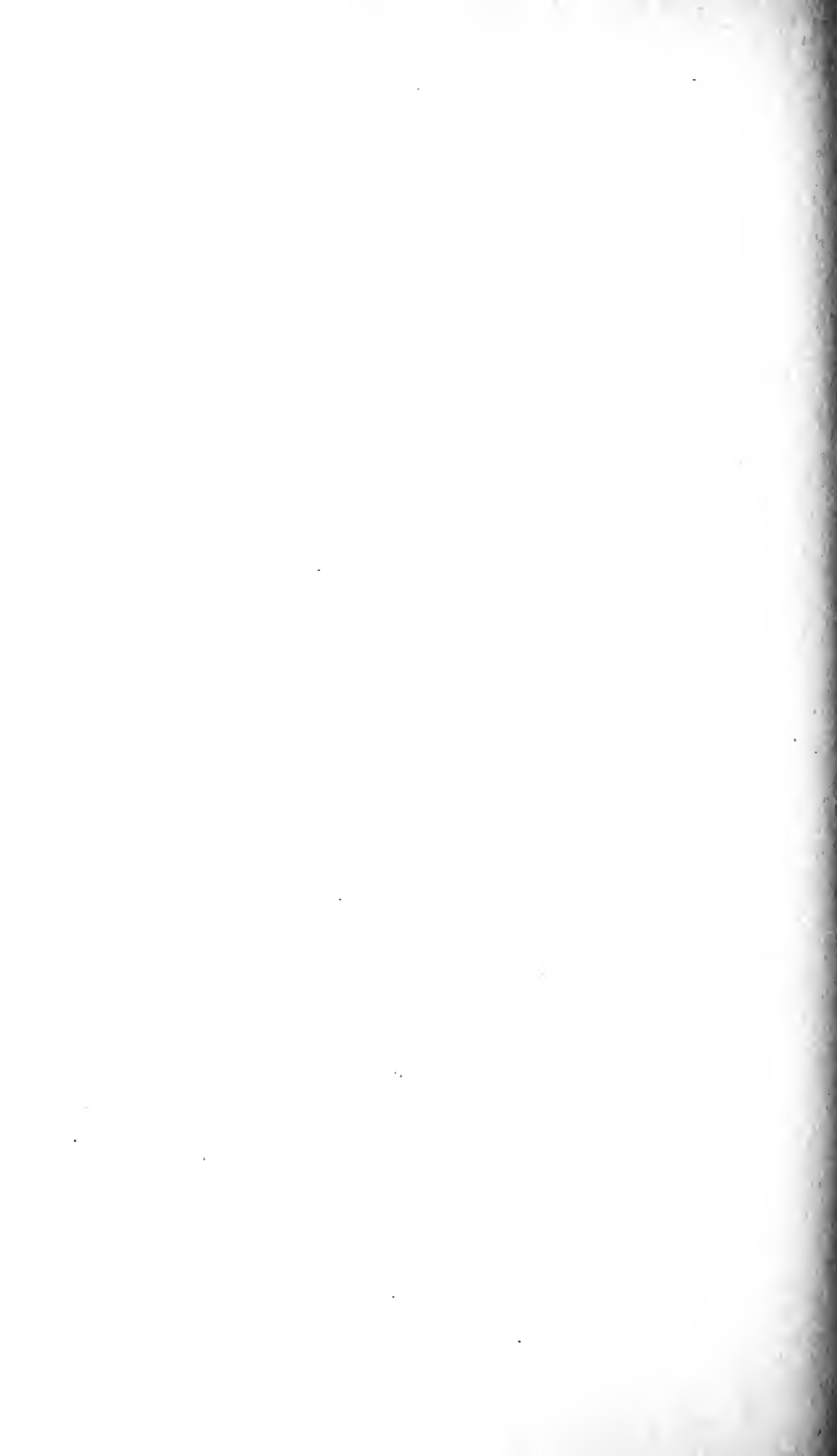
Dated, San Francisco, California,
September 12, 1951.

Respectfully submitted,

C. DAN LANGE,

CLYDE R. ROCKWELL,

Attorneys for Appellant.



NO. 13014

**In the United States Court of Appeals
for the Ninth Circuit**

HENRY T. TANIMURA, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

BRIEF FOR APPELLEE

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FILED

OCT 15 1951

PAUL E. O'BRIEN
CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 13014

HENRY T. TANIMURA, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION*

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

Appellant, defendant below, appeals from a judgment entered April 16, 1951, by the United States District Court for the Northern District of California, Southern Division, granting appellee an injunction, directing restitution of rent overcharges in the amount of \$5662.87 pursuant to Section 205(a) of the Emergency Price Control Act of 1942, as amended, (50 U.S.C.A. App. 925(a)) and Section 206(b) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. 1896(b)) and single damages in the amount of \$1677.50 under Section 205 of said Act (50 U.S.C.A. App. 1895) (R. 30-32). Appellant charges that the lower court erred in denying him a jury trial and it is upon that issue that appellant relies upon this appeal (R. 43). Notice of appeal was filed June 14, 1951 (R 33). Jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1291 (28 U.S.C. 1291).

COUNTER-STATEMENT OF CASE

The complaint was filed by the United States of America, appellee, February 28, 1950, against the appellant, Henry T. Tanimura and Charles S. Lee and Carol W. Lee,¹ charging the defendants with violation of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. App. 901 et seq.)², the Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. 1881 et seq.),³ and the Rent Regulations under said Acts (8 F.R. 7334; 12 F.R. 4302), by collecting rents in excess of the legal maximum for certain controlled rental housing accommodations identified as 1550 Fillmore Street, San Francisco, California (R. 3-9). In a schedule attached to the complaint plaintiff named the tenants alleged to have been overcharged, the rental accommodations occupied by them, the dates involved in their respective tenancies, the amount of rent collected, the legal maximum rent and the overcharges (R. 9). Plaintiff demanded an injunction against further violations of the Rent Act, restitution of all overcharges collected in violation of both Acts,⁴ and treble damages for the overcharges within one year immediately preceding the institution of suit (R. 7-8).

¹ No service was ever obtained upon defendants Charles S. Lee and Carol W. Lee since they were reported to have moved to Hawaii (R. 25) and the action was dismissed without prejudice as to said defendants (R. 26).

² Hereinafter frequently referred to as the "Price Control Act".

³ Hereinafter frequently referred to as the "Rent Act".

⁴ Contrary to appellant's contention (Br. 5) plaintiff-appellee did not move to dismiss the action insofar as it sought relief under the Price Control Act. The action was dismissed only as to defendants, Charles S. Lee and Carol W. Lee for lack of service as above indicated (R. 26).

In his answer appellant claimed that the complaint did not state a cause of action (R. 13); that no action could be maintained for alleged violation of the Price Control Act (R. 13); that the action was barred because of laches (R. 13-14); that the rental accommodations in question were hotel accommodations and thus not subject to rent control during the period of alleged violation under the Rent Act (R. 14-15); that the provisions of Section 205 of said Act are not retroactive beyond April 1, 1949 (R. 16); and that if any overcharges were received by appellee such violations were neither wilful nor the result of failure to take practicable precautions against the occurrence of such violations (R. 16).

Demand for jury trial was filed by appellant with his answer August 31, 1950 (R. 18-19), whereupon appellee moved to strike the jury demand and supported such motion with points and authorities (R. 19-23). The motion was heard and granted October 9, 1950 by the Honorable Michael J. Roche, District Judge (R. 25, 34-39). The demand was renewed on the day of trial and again denied (R. 40).

Following answers by appellant to the complaint, as amended, and to the request for admissions and interrogatories served by plaintiff, and answer by plaintiff to the request for admissions served by appellant, the case was tried February 9 and 12, 1951 before the Honorable Michael J. Roche, Judge, and after all evidence had been heard and given due consideration judgment was ordered for the plaintiff in the form of an injunction, restitution of overcharges on behalf of the tenants and costs but no statutory damages (R. 26). Plaintiff

thereupon filed a motion requesting the Court to reconsider its refusal to award damages (R. 26). This motion was heard on March 5 and 12, 1951, whereupon the Court modified its former judgment and also awarded plaintiff damages in the amount of the overcharges which had occurred within one year immediately preceding the institution of suit (R. 26). Findings of fact and conclusions of law were filed April 13, 1951 (R. 24-29) and judgment entered April 16, 1951 (R. 30-32). Restitution was decreed in favor of 21 tenants in the total amount of \$5662.87, judgment for single damages in favor of the plaintiff in the amount of \$1677.50, and an injunction restraining defendant from further violations of the Rent Act and ordering him to pay the costs in the case (R. 30-32). The only error charged on this appeal is the lower Court's denial of appellant's demand for a jury trial (R. 43).

**STATUTES, CONSTITUTIONAL AMENDMENT, AND FEDERAL
RULES OF CIVIL PROCEDURE HERE INVOLVED**

All pertinent sections of the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947, as amended, together with the Seventh Amendment to the Constitution, and Rule 38(a) and (b) of the Federal Rules of Civil Procedure are set forth in the Appendix to this Brief (*infra*, pp. 17-19).

SUMMARY OF ARGUMENT

Since appellant conceded at the trial that he was not entitled to a jury trial on plaintiff's claim for restitution (R. 36), the sole question is whether appellant was entitled to a trial by jury on the claim for statutory damages under Section 205 of the Rent Act and if

denial thereof by the lower court constitutes reversible error in this case.

Appellee contends:

1. It was within the discretion of the trial court to try the equitable claims of the complaint first and its finding that violation existed was binding respecting the claim for liquidated damages. Hence, denial to appellant of a jury trial, even if he is entitled to one with respect to the claim for statutory damages, was harmless error since judgment was entered against appellant for single damages only.

2. An action by the United States to recover statutory damages under Section 205 of the Housing and Rent Act is not in the nature of a suit at common law and was unknown to the common law at the time of the adoption of the Seventh Amendment to the Constitution in 1791. Consequently, this was not an action in which there was a right to trial by jury.

Accordingly, the judgment should be affirmed.

ARGUMENT

I.

It was within the discretion of the trial court to try the equitable claims of the complaint first and its finding that violation existed was binding respecting the claim for liquidated damages. Hence, denial to appellant of a jury trial, even if he is entitled to one with respect to the claim for statutory damages was harmless error since judgment was entered against appellant for single damages only.

Appellant may only obtain a reversal of the judgment below upon the ground that he was unlawfully deprived of a trial by jury if he establishes that the denial of the jury trial affected substantial rights. As will be shown hereafter, appellant did not suffer any preju-

dice from the manner in which the trial was conducted nor in the denial by the trial judge of the demand for a jury trial.

The complaint in the instant case set forth three claims for relief. Count I set forth a claim for restitution pursuant to Section 205(a) of the Emergency Price Control Act of 1942 (R. 3-4). Count II set forth a claim for restitution and injunctive relief pursuant to Section 206(b) of the Housing and Rent Act of 1947, as amended (R. 4-5); and Count III set forth a claim for liquidated damages pursuant to Section 205 of the Housing and Rent Act of 1947, as amended (R. 6-7). As relief the prayer requested (1) an injunction against further violations; (2) an order of restitution pursuant to the Price Control Act of 1942 and the Housing and Rent Act of 1947; and (3) a judgment for liquidated damages pursuant to the Housing and Rent Act of 1947 (R. 7-8).

It was within the complete discretion of the trial court to try the equitable claims first and thereafter to try the claim for liquidated damages. This was made clear by the recent decision in *Orenstein v. United States*, F. 2d (C.A. 1) (Decided July 25, 1951 and not yet reported). In that case, Chief Judge Magruder, speaking for the Court said the following on this point:

“However, the joinder of these two causes of action in a single complaint may have one important consequence in relation to the factual issues triable as of right before a jury. The issue whether the landlord in fact overcharged the tenant in violation of the regulation is common to the two causes of action. The order of trial is in the discretion of the district judge. Since the cause of action under Section 206(b) for injunction and restitu-

tion is equitable in nature, the court in disposing of that claim is entitled to make findings of fact on the issues of violation and the amount of the overcharges without participation by a jury. Determinations of fact so made, if not 'clearly erroneous', are binding on the defendant, who is not entitled to relitigate such issues before a jury in the disposition of the cause of action for treble damages under Section 205. If the judge chooses to take this course, the only factual issues left to be tried by a jury as a matter of right in the treble damage action under Section 205 have to do with whether the violation, conclusively established by the findings of the court, was willful or 'the result of failure to take practicable precautions against the occurrence of the violation.' Unless the defendant sustains the burden of satisfying the jury that the violation was neither willful nor negligent, the United States is entitled as of right to judgment for damages equal to three times the amount of the overcharges. *Meyercheck v. Givens*, 186 F. 2d 85 (C.A. 7th, 1950)."

So here, too, it is reasonable to assume, in the absence of any evidence to the contrary, that the trial court concluded in the exercise of its discretion to try the equitable claims first. This presumption may be indulged in because this would have been the orderly method of trying the case since Counts I and II which asserted claims for restitution and injunctive relief preceded Count III which asserted a claim for liquidated damages. We have no right to assume that the Court would put the "cart before the horse". Moreover, every inference should be drawn to support the propriety of a ruling below upon appeal. (See *Boley v. Griswold*, 87 U. S. 486, 488; *Hardt v. Kirkpatrick*, 91 F. 2d 875 (C.A. 9); *Bakersfield Abstract Co. v. Buckley*, 100 F. 2d 530 (C.A. 9); *Aetna Insurance Co. v. Rhodes*, 170 F. 2d 111, 115 (C.A. 10)).

Further indication that the court tried the equitable counts first is evidenced by the fact that after trying the case, the record shows that the Court initially concluded that the plaintiff was only entitled to an injunction and restitution of overcharges on behalf of the tenants and costs but not entitled to damages (R. 26). Thus, at this point, it was clear that the appellant could claim no prejudice for being deprived of a jury trial with respect to the liquidated damage claims since no liquidated damages had been awarded to the plaintiff. See *Orenstein v. United States, supra*. Also, at this point it must be manifest that the Court had considered the claim for restitution and injunctive relief *before* considering the question as to the Government's right to liquidated damages. The record clearly shows that appellee moved the Court to reconsider its refusal to award damages *after* the Court had already indicated that solely restitution and an injunction would be ordered. It was only after a hearing upon plaintiff's motion for reconsideration of the Court's denial of damages that the Court modified its previous oral judgment and awarded plaintiff damages in single the amount of the overcharges which had occurred within one year immediately preceding the institution of this action (R. 26). The findings made upon the Court's consideration of violation respecting the restitution claim were binding upon appellant on the statutory damage claim since he was "not entitled to relitigate such issues before a jury in the disposition of the cause of action for treble damages under Section 205". *Orenstein v. United States, supra*. The only question open to the jury at this point was whether appellant's

violation was wilfull or negligent as to authorize the Court to grant treble or single the amount of the overcharge. *Orenstein v. United States, supra*. Thus, at this point, too, it would appear that the appellant suffered no prejudice by a denial of the trial by jury since by awarding single damages only, the Court must have found an absence of wilfulness in the violation,⁵ which was the only issue for a jury to decide. Therefore, "even if the denial of a jury trial was wrong, it was harmless error for there was no issue of fact to submit to a jury." (*Forster v. Insurance Co. of North America*, 139 F. 2d 875 (C.A. 2)). At least it cannot be said that appellant would have been any better off if this issue had been submitted to a jury and if its verdict of freedom from wilfulness had been rendered in his favor. The trial court had already rendered a ruling as favorable to appellant on this issue as any jury could have reached.

II

An action by the United States to recover statutory damages under Section 205 of the Housing and Rent Act is not in the nature of a suit at common law and was unknown to the common law at the time of the adoption of the Seventh Amendment to the Constitution in 1791. Consequently this was not an action in which there was a right to trial by jury.

There is no merit to the contention that appellant's constitutional rights to a trial by jury were violated in any event. The Seventh Amendment to the Constitu-

⁵ Treble damages are mandatory unless the defendant sustains the burden of proving that the violation was neither wilful nor the result of failure to take practicable precautions in which event single damages must be awarded. (*Orenstein v. United States, supra*; *Meyercheck v. Givens*, 186 F. 2d 85 (C.A. 7)).

tion restricts the right of trial by jury "in suits at common law", and Rule 38 of the Federal Rules of Civil Procedure (28 U.S.C.A. foll. 723c) preserves such right to jury trial "as declared by the Seventh Amendment or as given by a statute of the United States." The Government's right of action for restitution and liquidated damages for rental overcharges is primarily a special right of action created by statute and not a suit at common law. The decision of the Supreme Court in *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 48 and *Block v. Hirsh*, 256 U. S. 135, 158, are, therefore, controlling.

In *Labor Board v. Jones and Laughlin*, *supra*, the Board, pursuant to Section 10(c) of the National Labor Relations Act of 1935, not only ordered reinstatement of employees wrongfully discharged but likewise directed the payment of wages for the time lost by the discharge, less amounts earned by the employees during that period. Respondent argued that this order was equivalent to a money judgment and, therefore, violated the guaranty of the Seventh Amendment to a trial by jury. Rejecting this claim, the Supreme Court said (301 U. S. at p. 48) :

"The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. *Shields v. Thomas*, 18 How. 253, 262; *In re Wood*, 210 U.S. 246, 258; *Dimick v. Schiedt*, 293 U.S. 474, 476; *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. *Clarke v. Wooster*, 119 U. S. 322, 325;

Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273, 279. It does not apply where the proceeding is not in the nature of a suit at common law. *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 537.

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

While the Court declared that "Thus it [the Seventh Amendment] has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law", this does not mean that if recovery of money damages is separate and distinct from the claim for equitable relief, the Seventh Amendment applies. The sentence used in its context is merely illustrative of the cases in which the Seventh Amendment has no application. Reasonably read in its context, it was not intended to be exclusively used as shown by the next sentence that the Seventh Amendment "does not apply where the proceeding is not in the nature of a suit at common law. *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 537."

In the *Guthrie* case the claim asserted was a legal claim wholly unconnected and separate from any equitable relief. It was a claim against a municipal corporation based upon scrip, warrants or other evidence of indebtedness issued by the municipality. Yet in the *Guthrie* case, the Supreme Court said (173 U.S. at p. 537):

“There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if demanded, or else that the Seventh Amendment to the Constitution of the United States is violated, which provides that ‘in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.’

This act does not infringe upon that amendment. The proceeding under it is not in the nature of a suit at common law, * * *’.

Thus, it is apparent from both the *Jones and Laughlin* and *Guthrie* cases the sole test is whether “the proceeding was one unknown to the common law”, and whether “it is a statutory proceeding” (See, *Labor Board v. Jones and Laughlin*, supra, 301 U.S. at p. 48). If it is a statutory proceeding and if the remedy is imposed “for violation of the statute and are remedies appropriate to its enforcement”, the Seventh Amendment does not apply. This same view was expressed more recently in *National Labor Relations Board v. Williamson-Dickie Manufacturing Co.*, 130 F. 2d 260 (C.A. 5), where the Court in speaking of a reparation order under the National Labor Relations Act said (at p. 263):

“The proceeding is not, it cannot be made, a private one to enforce a private right. It is a public procedure looking only to public ends.”

As in the *Jones & Laughlin* and *Williamson-Dickie Manufacturing Co.* cases, so here, too, the action is a statutory action by the Government to vindicate the public interest. It is not a private suit to enforce a private right. The remedy for statutory damages is imposed as in *Jones & Laughlin* “for violation of the

statute" and is merely "appropriate for its enforcement" (301 U.S. at p. 48). It is a statutory proceeding wholly unknown to the common law which confers upon the Government a right which never existed and which was never asserted at common law, and hence the Seventh Amendment cannot be said to apply.

The principles announced in *Labor Board v. Jones & Laughlin* have been applied by many District Courts in striking demands for juries in statutory damage actions under the Emergency Price Control Act and the Housing and Rent Act of 1947.

Reported decisions are *United States v. Shaughnessy*, 86 F. Supp. 175 (D. Mass.); *Creedon v. Arielly*, 8 F.R.D. 265 (W.D. N.Y.); *United States v. Friedman, Rule, Pitman*, 89 F. Supp. 957 (S.D. Iowa).

Unreported decisions include: *Woods v. Endekay Realty Corp.*, Civil Action 44-302 (S.D. N.Y.), Ryan, J.; *United States v. Osipoff, Gibson*, Civil Action 1106 (S.D. Cal.), Metzger, J., decided August 8, 1949; *United States v. Stein*, Civil Action 3412 (M.D. Pa.), Follmer, J., decided February 20, 1950; *United States v. Cherico*, Civil Action 7848 (M.D. Pa.), Follmer, J., decided December 5, 1949; *United States v. Caldwell*, Civil Action 4387 (W.D. N.Y.), Knight, J., decided January 23, 1950; *United States v. Ullrich*, Civil Action 5230 (D. Md.), decided April 13, 1951; *United States v. Sicherer*, Civil Action 805 (D. Nev.), decided April 19, 1950; *United States v. Kennedy*, Civil Action 803 (D. Nev.), decided April 19, 1950; *United States v. Hall*, Civil Action 998 (W.D. N.C.), Warlick, J., decided April 25, 1950; *United States v. Kenter*, Civil Action 2922 (N.D. Cal.), *United States v. Barrett*, Civil

Action 9749 (E.D. Pa.), Ganey, J., decided June 21, 1950; *United States v. Winchester*, Civil Action 1432 (W.D. Mich.), Starr, J., decided August 14, 1950; *United States v. Siegel*, Civil Action 2532 (D. La.), Wright, J., decided September 27, 1950. Contra: *Orenstein v. United States*, *supra*; *United States v. Strymish*, 86 F. Supp. 999 (D. Mass.); *United States v. Hart*, 86 F. Supp. 787 (E.D. Va.); *United States v. Friedland*, 94 F. Supp. 721 (D. Conn.); *United States v. Jepson*, 90 F. Supp. 983 (D. N.J.).

As the Court said in *United States v. Friedman, Rule, Pitman*, *supra*, which involved three actions under the Housing and Rent Act (at page 961):

“Certainly, it could not be successfully argued here that these actions brought as they have been in pursuance of Section 205 of the Housing and Rent Act of 1947, as amended, for treble damages, is a suit at common law. Rather the treble damage feature of these actions is in its entirety a creature of the statute and by no stretch of the imagination existed at the common law, and defendants’ contentions thereon are wholly untenable.”

Also in *Creedon v. Arielly*, *supra*, in an action for treble damages under the Price Control Act, Judge Knight said (p. 268):

“* * * although defendant has moved for a jury trial of this action, the constitutional right to a jury trial is not applicable to this case. Amendment VII of the United States Constitution grants the right of trial by jury ‘in suits at common law.’ It does not apply to an action under the Emergency Price Control Act of 1942. ‘It is only to rights and remedies as they were generally known and enforced at common law by jury trial that the

amendment applies'. *Agwilines, Inc. v. National Labor Relations Board*, 5 Cir., 87 F. 2d 146, 150."

The same principle has been applied in other actions to which the Government has been a party. See *Galloway v. United States*, 319 U.S. 372; *Simmons v. United States*, 29 F. Supp. 285 (W. D. Ky.). See, too, *Bellavance v. Plastic-Craft Novelty Co.*, 30 F. Supp. 37 (D. Mass.).

With these principles and authorities in mind, a case such as *Bruckman v. Hollzer*, 152 F. 2d 730 (C.A. 9) is clearly distinguishable. In the *Bruckman* case a private party sought to enforce a private right. There was not present as here, a situation where the Government was attempting to protect the public interest by invoking a statutory remedy appropriate for enforcing a statute. So, too, cases such as *United States v. Hepner*, 213 U.S. 103, are distinguishable since they involve actions to enforce a *penalty*, whereas the instant action is one for "liquidated" damages (See *Kessler v. Fleming*, 163 F. 2d 464, 468 (C.A. 9); *Culver v. Bell & Loffland*, 146 F. 2d 29 (C.A. 9); *Amato v. Porter*, 157 F. 2d 719 (C.A. 10); *Woods v. Robb*, 171 F. 2d 539 (C.A. 5).

As said in the *Robb* case, *supra*, "The suit involves only civil sanctions, imposed as deterrents rather than punishment" (171 F. 2d at p. 541). "Multiple exemplary damages whose allowance depends upon the recovery of actual damages, have never, so far as we are aware been regarded as amounting to a criminal penalty" (*Kessler v. Fleming*, *supra*, 163 F. 2d at p. 468, Judge Healy speaking for this Court).

CONCLUSION

In view of the above authorities, therefore, it is respectfully submitted that this appeal should be dismissed and the judgment below affirmed.

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APPENDIX

Emergency Price Control Act of 1942, as amended (50 U.S.C.A. App. 901, et seq.) :

Section 1(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

Sec. 205.(a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. 1881, et seq.) :

Sec. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable

to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided*, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided*, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered.

Sec. 206.(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Federal Rules of Civil Procedure (28 U.S.C.A. foll. 723c):

Rule 38(a) *Right Preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Seventh Amendment to the Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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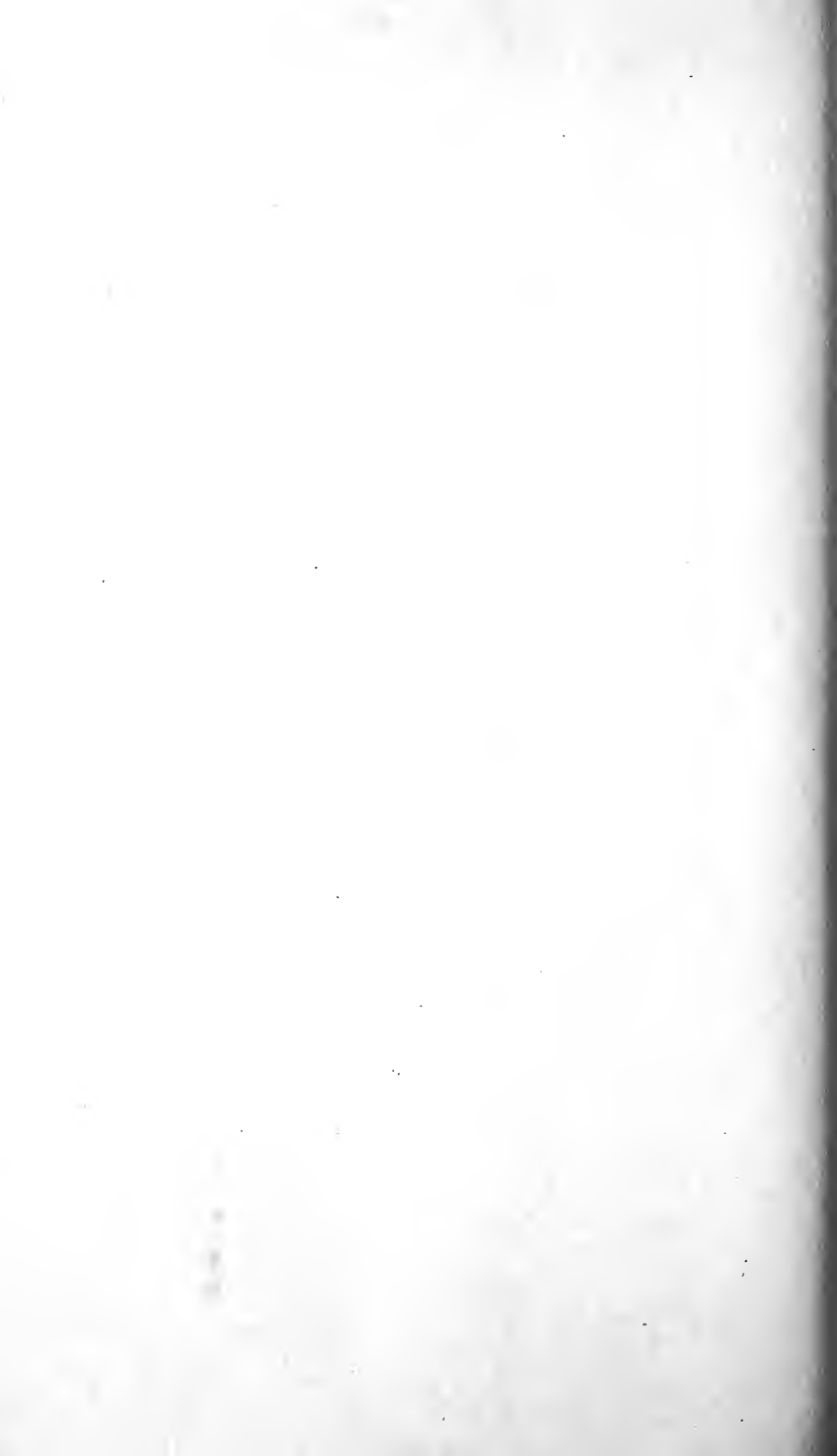
REPLY BRIEF OF APPELLANT.

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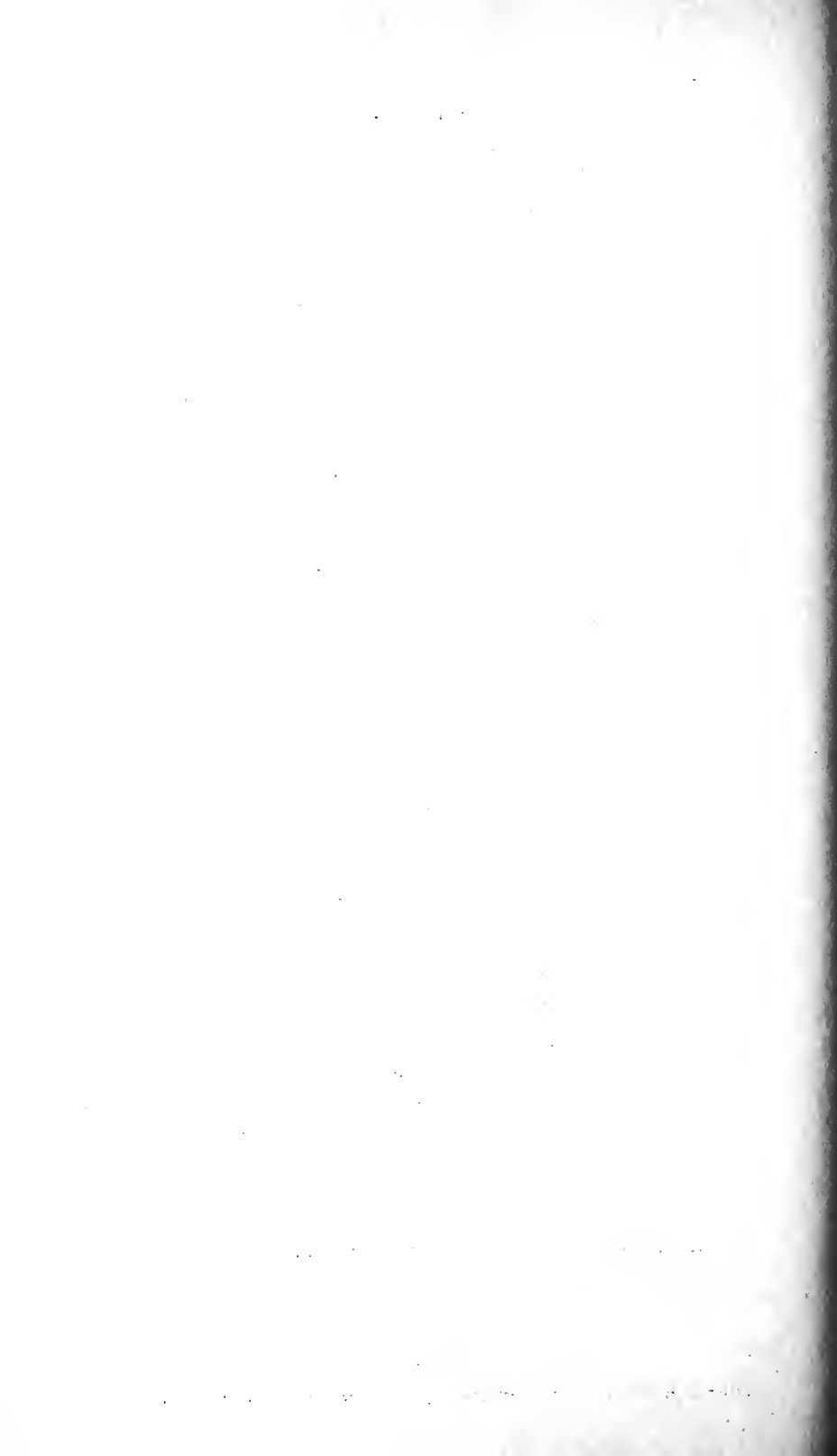
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IN THE

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HENRY T. TANIMURA,

Appellant,

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UNITED STATES OF AMERICA,

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**Appeal from the United States District Court for the Northern
District of California, Southern Division.**

REPLY BRIEF OF APPELLANT.

SUMMARY OF STATEMENT OF THE CASE.

Both statements of the case are in accord on all matters which affect the issue here involved. However, appellant would like again to point out that the judgment of the lower Court in awarding appellee \$1,677.50 (T.R. 32) under Section 205 of the Housing and Rent Act of 1947 in effect penalized appellant by making him pay twice the amount of all alleged overcharges occurring within the one year prior to the commencement of the action. Appellant was not only required to reimburse the tenants for all alleged overcharges (T.R. 31) which they had paid but appellant was also required to pay a like sum to appellee.

SUMMARY OF THE ARGUMENT.

As appellee did not discuss the points and most of the authorities set forth in appellant's opening brief, appellant will discuss appellee's points and authorities in the order as set forth in appellee's brief. Before doing so appellant notes that appellee did not cite one decision by any federal appellate court denying to a litigant a trial by jury in a civil action involving a penalty.

I.

Appellee's first point is that even if appellant was entitled to a jury trial, denial of the same was not reversible error. Two decisions are cited by appellee to sustain this position.

Orenstein v. United States, 191 F. 2d Supp.
No. 1, 184;

Forster v. Insurance Co. of North America, 139
F. (2d) 875.

Forster v. Insurance Co. of North America, supra, 877, is not in point. In the *Forster* decision the Court stated "there was no issue of fact to submit to a jury". In this case now before the Court there are many issues of fact to submit to the jury such as whether the premises in question was a hotel, whether the alleged violations were wilful and the amount of the overcharges. It is also doubted whether *Orenstein v. United States*, supra, is in point as in that case,

unlike this one, the trial Court granted no legal relief. To quote from the Court, *Orenstein v. United States*, supra, at page 193:

“Though the defendant was entitled to a jury trial with respect to the cause of action for damages under Section 205, the court’s denial of such jury trial became harmless error, since the eventual judgment awarded no damages to the plaintiff on this cause of action.”

It is true that federal Courts have come to contrary decisions over the right to have a jury trial where identical legal and equitable issues are presented in the same case. Some Courts hold that there is no absolute right to have the common issue heard by the jury, and therefore if the trial Court rules improperly that there is no jury issue involved, its ruling is not prejudicial since even if the trial Court had found a right to trial by jury it could have heard the common issue as a Court matter. This appears to be the rule that would have been applied in *Orenstein v. United States*, supra, if the issue had been presented.

It is respectfully submitted that such a rule is contrary to the meaning and intent of Rules 38 (a) and 39 (a) of the Federal Rules of Civil Procedure. Rule 39 (a) provides:

“Trial By Jury Or By Court. (a) When trial by jury has demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury * * *.”

Many Courts, including this Court, recognize the requirement of these rules to have the common issue tried by jury.

Bruckman v. Hollzer, 152 F. (2d) 730, 732-733.

In *Bruckman v. Hollzer*, supra, at pages 732, this Court stated the rule to be followed in this Circuit:

“Plaintiff contends that whether or not the Di Menna case states the law prior to the adoption of the Federal Rules of Civil Procedure, those rules now give to the party having a claim triable by jury at common law the power to preserve that right when that claim is joined with other equitable issues involving one of the issues of fact in the common law suit. If this contention be correct, it is obvious that, since the right issue of infringement is common to all three sets of transactions, the right of jury trial on the common law transaction may be preserved only if the court is required to try the common issue so that judgment on the verdict is entered before the equitable claims are decided. This is the view held by Judge Moscowitz in *Elkins v. Nobel*, 1 F.R.D. 357, 358, and Judge Conger in *Dellefield v. Blockdel Realty Co.*, D.C., 1 F.R.D. 689, 690.

“We agree with these judges that the Federal Rules of Civil Procedure make such a preservation of the demanded right of jury trial and that to that end the trial judge is required to try and determine that issue before the others. The rules introduce the radical change in federal practice of creating the jurisdiction in the District Courts to hear and determine in a single suit equity

claims, with a claim which theretofore could have a common law adjudication in a separate suit. We take it that it is to 'preserve' in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that Rule 38 (a) provides: '(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' "

Appellee did not discuss *Bruckman v. Hollzer*, supra, in connection with its first point but stated on page 15 of its brief in connection with the second point: "With these principles and authorities in mind, a case such as *Bruckman v. Hollzer*, 152 F. 2d 730 (C.A. 9) is clearly distinguishable. In the *Bruckman* case a private party sought to enforce a private right." In regard thereto, it must be pointed out that the United States sought to enforce a public right in this Court's decision of *Connolly v. United States*, 149 F. (2d) 666, 669, and there is no indication that the Court felt that such was any bar to its recognition of the defendant's right to a jury trial.

It is hard to conclude anything other than appellee should not profit by the error which it urged upon the trial Court, for it was appellee who urged the trial Court to "put the cart before the horse", quoting from page 7 of appellee's brief.

II.

Appellee's second point is that in any event appellant was not entitled to a jury trial. The question has been recently passed upon by the United States Court of Appeals for the First Circuit on July 25, 1951, in *Orenstein v. United States*, supra, 191 F. 2d Supp. No. 1, 189-190. After a full discussion of the question in the *Orenstein* decision, the Court concluded at page 190:

"Thus we think it clear that, if the present complaint by the United States had been solely for treble damages under Section 205 of the Act, the defendant would have been entitled as of right to demand a jury trial. See accord, 35 Minn. 1 Rev. 304 (1951). This separate and distinct cause of action for damages in the nature of penalty does not lose its character as an action at law, and become merely an 'equitable adjunct,' by reason of being joined in a single complaint with another cause of action of an equitable nature under Section 206(b) of the Act. See the discussion by Judge Ford in *United States v. Stymish*, 86 F. Supp. 999 (D.C. Mass. 1949)."

It is, however, contended that *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 48, is authority to the effect that appellant is not entitled to a jury trial in this cause. Similarly cited by appellee is *National Labor Relations Board v. Williamson-Dickie Manufacturing Co.*, 130 F. (2d) 260. We respectfully submit that these decisions are not in point. In *N.L.R.B. v. Jones and Laughlin Steel Corp.*, supra, the Supreme Court dealt with the

question whether Congress could create an administrative agency with limited original jurisdiction over fact finding without violating the Seventh Amendment to the Constitution. To quote from the decision at page 48 as was done in appellee's brief at pages 11-12:

"The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding."

We do not have here an administrative proceeding. This case arose in a federal District Court which exercises true judicial power as distinguished from quasi-legislative and quasi-judicial functions. The type of proceeding provided for and the jurisdiction granted to the federal District Courts under the Housing and Rent Act of 1947 are familiar to the common law, but the type of proceeding of and the jurisdiction exercised by the National Labor Relations Board, as was pointed out in the *Jones and Laughlin Steel* case, are unknown to the common law. In *Orenstein v. United States*, supra, 189-190, the Court considered the nature of an action under Section 205 of the Housing and Rent Act of 1947 and found it one which would fall within the well-recognized forms of action of the common law.

" 'Actions which at common law would fall within well-recognized forms of action, and which are not complicated by equitable defenses are jury action if demand for jury is made.' 3 Moore's Fed. Practice p. 3010. A tenant's action

under Section 205 of the Housing and Rent Act of 1947, seeking recovery of liquidated damages by way of compensation for injury suffered by him individually, would, under the common law forms of action, have been enforced by an action on the case; and therefore the defendant in such a complaint would be entitled to a jury trial. If the United States brings the action for damages under Section 205, in default of suit by the tenant within 30 days of the date of violation, it is seeking 'damages in the nature of penalties' (328 U.S. at 401-402), an added sanction in the public interest in aid of effectuating the purposes of the Act. Such an action by the United States to recover a statutory penalty would be enforced, under the earlier forms of action at common law, by an action of debt. In *Hepner v. United States*, 213 U.S. 103, 115 (1909), in an action of debt brought by the United States to recover a penalty imposed by the Alien Immigration Act of 1903, the Court recognized that the defendant had the constitutional right to have a jury pass upon any triable issues of fact. The defendant is entitled to a jury trial of an action brought under Section 205 of the Housing and Rent Act, notwithstanding that the cause of action is based upon an Act of Congress. Not only is this clear from cases involving suits for statutory penalties but as a further instance it is well settled that in actions for treble damages under the Sherman Act, 15 U.S.C. 15, the defendant is entitled to a jury trial. *Fleitmann v. Welsback Street Lighting Co.*, 240 U.S. 27 (1916); *Ping v. Spina*, 166 F. 2d 546 (C.A. 2d, 1948). See also *Arnstein v. Porter*, 154 F. 2d 464, 468 (C.A. 2d 1946); *United States*

v. Jepson, 90 F. Supp. 983 (D.C. N.J. 1950). Likewise it has been held that in an action by an employee under Section 16(b) of the Fair Labor Standards Act of 1938 to recover overtime compensation and a like amount as liquidated damages, the parties are entitled as of a right to a jury trial, though the statute itself is silent on the point. *Olearchick v. American Steel Foundries*, 73 F. Supp. 273 (D.C. Pa. 1947)."

Likewise *Block v. Hirsh*, 256 U.S. 135, cited by appellee in his brief at page 10, does not involve an action or suit in a federal District Court but rather an administrative proceeding. *Guthrie National Bank v. City of Guthrie*, 173 U.S. 528, is not in point, cited at page 11 of appellee's brief. The Guthrie decision involves the right of a state or territory to create non-legal obligations on the part of its subdivisions under a claims procedure not providing for jury trial, page 537 of the decision. We do not dispute the sovereign's right to exercise such a power but that issue is not here involved.

Appellee makes one further contention at page 15 of his brief which is that no penalty is here involved. In view of *Porter v. Warner Holding Co.*, 328 U.S. 395, 401-402, which was not discussed by appellee, this position is untenable. Furthermore, appellee's citations that Section 205 of the Housing and Rent Act of 1947 and Section 205(e) of the Emergency Price Control Act of 1942 are not criminally penal are not in point for the question here is whether a civil penalty is involved and that question was de-

terminated by *Porter v. Warner Holding Co.*, supra, at page 402:

“It establishes the sole means whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in the nature of penalties. Moreover a court giving relief under Section 205(e) acts as a court of law.”

And if the action is for “liquidated damages”, which it is respectfully submitted it is not, *Porter v. Warner Holding Co.*, supra, it still is a matter which historically would be for the sole and exclusive jurisdiction of a common law court.

CONCLUSION.

For the reasons heretofore stated the judgment and decree herein should be reversed with direction that those issues affecting the legal claim be first tried by jury before any judgment or decree shall be herein rendered.

Dated, San Francisco, California,

October 24, 1951.

Respectfully submitted,

C. DAN LANGE,

CLYDE R. ROCKWELL,

Attorneys for Appellant.

No. 13,014

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HENRY T. TANIMURA,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**APPELLANT'S PETITION FOR A REHEARING
AND THAT THE REHEARING BE HEARD IN BANK.**

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FILED

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**PAUL P. O'BRIEN
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No. 13,014

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HENRY T. TANIMURA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**APPELLANT'S PETITION FOR A REHEARING
AND THAT THE REHEARING BE HEARD IN BANK.**

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

The above named appellant, Henry T. Tanimura, presents this his petition for rehearing of this cause and respectfully requests that the Court hear the matter in bank and in support of his petition respectfully represents:

PRELIMINARY STATEMENT.

This cause arose out of a suit filed by appellee under the Housing and Rent Act of 1947 joining a legal cause of action under Section 205 of the Act with an equitable cause of action under Section 206

of the Act. The legal and equitable causes of actions have many common issues of fact the main one of which was whether the premises in question are in fact controlled housing accommodations or are in fact a hotel.

Appellant duly made a demand for a jury trial, and appellee moved to strike the same which motion was granted. The cause was tried by Court and a judgment was rendered in favor of appellee for damages in the amount of all of the overcharges occurring within one year prior to the commencement of the action. The lower Court further ordered by way of equitable relief restitution of all overcharges in favor of the tenants and granted an injunction restraining appellant against future violations of the Act.

APPELLANT WAS ENTITLED TO A JURY TRIAL AS TO ALL ISSUES INVOLVED IN THE LEGAL CAUSE OF ACTION AND DENIAL OF THE SAME WAS REVERSIBLE ERROR.

The decision in this cause has silently overruled *Bruckman v. Hollzer*, 152 F. (2d) 730, 9 C.A., a decision decided by other members of the Court still sitting with the Court. The result leaves in doubt the extent of the right of a jury trial in a suit which presents common questions of fact to both legal and equitable causes of action.

In this cause the Court stated:

“It was within the sound discretion of the court as to whether the equitable issues or the law issues should take precedence in trial. It is

apparent that the overshadowing purpose of the action by the government as plaintiff was to effectuate rent control law. Those overcharged failed to exercise their right to bring action and had the government been complaisant as to substantial overcharges it would seem but an invitation to lawlessness that would tend to break down the benefits sought by this wartime remedial legislation. Restraint against future violation with statutory damages as a deterrent to law violation motivated the government. In these circumstances the trial judge wisely decided to go immediately to the equitable issues."

It is not evident in deciding this cause that the Court considered the Federal Rules of Civil Procedure and the extent to which Rules 38a and 39a were intended to "preserve" the right of trial by jury under the Seventh Amendment to the Constitution of the United States. This Court has, however, in *Bruckman v. Hollzer*, supra, 152 F. (2d) 730, at page 732, considered this identical question under the Federal Rules of Civil Procedure and resolved the question as follows:

"Plaintiff contends that whether or not the Di Menna case states the law prior to the adoption of the Federal Rules of Civil Procedure, those rules now give to the party having a claim triable by jury at common law the power to preserve that right when that claim is joined with other equitable issues involving one of the issues of fact in the common law suit. If this contention be correct, it is obvious that, since the right issue of infringement is common to all three sets of

transactions, the right of jury trial on the common law transaction may be preserved only if the court is required to try the common issue so that judgment on the verdict is entered before the equitable claims are decided. This is the view held by Judge Moscowitz in *Elkins v. Nobel*, 1 F.R.D. 357, 358, and Judge Conger in *Dellefield v. Blockdel Realty Co.*, D.C., 1 F.R.D. 689, 690.

“We agree with these judges that the Federal Rules of Civil Procedure make such a preservation of the demanded right of jury trial and that to that end the trial judge is required to try and determine that issue before the others. The rules introduce the radical change in federal practice of creating the jurisdiction in the District Courts to hear and determine in a single suit equity claims, with a claim which theretofore could have a common law adjudication in a separate suit. We take it that it is to ‘preserve’ in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that Rule 38(a) provides: ‘(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.’ ”

“In failing to cite or consider *Bruckman v. Hollzer*, the Court has in this cause, it is respectfully submitted, established a contrary rule which rule it is submitted is unsupported by and contrary to the clear meaning and intent of the Federal Rules of Civil Pro-

cedure. But it does more than that for it invades and limits a constitutionally guaranteed right. Such an invasion should be made with great care. The Court in this case has accepted the dicta of *Orenstein v. United States*, 191 F. (2d) 184, 190, C.A. 1, dicta set forth without citations in support thereof and without consideration of the Federal Rules of Civil Procedure, and in so doing ignored its own well-considered decision on the identical question, *Bruckman v. Hollzer*, *supra*.

The denial of the right of a jury trial must of necessity in view of the Seventh Amendment to the Constitution be reversible error.

Lewis v. Times Pub. Co., 185 F. (2d) 457, 5 C.A.;

Connolly v. U. S., 149 F. (2d) 666, 9 C.A.;

Bass v. Hoagland, 172 F. 2d 205, 5 C.A., certiorari denied 388 U.S. 816.

In the latter decision, *Bass v. Hoagland*, *supra*, the Court considered the fundamental nature of the right and went so far as to hold that a judgment in a cause where there had been an improper denial of a trial by jury was void and subject to collateral attack, and at page 209 the Court stated:

“The right of a jury trial, if not waived but denied after demand, the judge usurping the function of the jury, would seem to be similarly an unconstitutional abuse of power.”

The Supreme Court has recently in *Dice v. Akron C. & Y. R. Co.*, 96 S. Ct. Supp. No. 8 at page 285,

288, considered the far reaching effect and fundamental nature of the right of trial by jury under the Seventh Amendment and in so doing has concluded that the right follows federal rights even when the same are being litigated in state Courts and under the state rule there would be no right of trial by jury.

It cannot be concluded otherwise than that error can be nothing otherwise than reversible error if that error be a denial of a trial by jury under the Seventh Amendment to the Constitution.

Wherefore, appellant respectfully urges that this petition for a rehearing be granted with the Court hearing the same in bank and that the judgment of the District Court be upon further consideration reversed.

Dated, San Francisco, California,
April 4, 1952.

Respectfully submitted,

C. DAN LANGE,

CLYDE R. ROCKWELL,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

We, C. Dan Lange and Clyde R. Rockwell, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is in our judgment well founded and that it is not interposed for delay.

Dated, San Francisco, California,
April 4, 1952.

C. DAN LANGE,
CLYDE R. ROCKWELL,
*Counsel for Appellant
and Petitioner.*







